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In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT APPENDIX

(VOLUME 4)

PAUL D. CLEMENT
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record
for Petitioners

NANCY HOLLANDER
Freedman Boyd Daniels
Hollander & Goldberg P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102
(505) 842-9960

Counsel of Record
for Respondents

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CV-00-1647 JP/RLP

O CENTRO ESPIRITA BENEFICIENTE
UNIAO DO VEGETAL, ET AL., PLAINTIFFS

vs.

JOHN ASHCROFT, ET AL., DEFENDANTS

TRANSCRIPT OF PROCEEDINGS

Motion Hearing
Oct. 29, 2001

BEFORE: THE HONORABLE JAMES A. PARKER
United States District Judge

APPEARANCES

FOR THE PLAINTIFF:

NANCY HOLLANDER
JOHN W. BOYD
FREEDMAN, BOYD, DANIELS,
HOLLANDER, GOLDBERG & CLINE
20 First Plaza, Suite 700
Albuquerque, New Mexico 87102

FOR THE DEFENDANT:

ELIZABETH GOITEIN
VINCENT M. GARVEY
UNITED STATES DEPARTMENT
OF JUSTICE CIVIL DIVISION
901 E. Street, N.W.
Room 1032
Washington, D.C. 20004

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* * * * *

[829]

First of all, why would information about other hallucinogens be relevant to hoasca?

A. What is known to be the major psychoactive component of hoasca is DMT, dimethyltryptamine, and dimethyltryptamine is one of the classical hallucinogens. It's been placed in that class for many years.

Q. And you said in your deposition that—well, withdrawn. What is it about hallucinogens in particular that make them a class?

A. Hallucinogens produce similar psychoactive effects in that they lead to at least illusions and sometimes frank hallucinations in the presence of the absence of disorientation or changes in consciousness that lead to total loss of a conscious connection with reality.

Q. Are you saying that all hallucinogens always lead to a total loss of connection with reality?

A. No. I am saying that they don't, that people who use hallucinogens have the experience of altered perceptions and altered cognition, but typically do not lose that connection with reality. They are not disoriented. They know where they are, they know who they are. So they still have those [830] major connections with reality.

Q. And are there any other similarities among the hallucinogens that we have grouped as a class?

A. There are chemical similarities. For example, LSD, psilocybin, MDMT fall into the same chemical subclass of classical hallucinogens, and that is the indolealkylamines.

Q. Now, you said in your deposition that the relevance of other hallucinogens to hoasca could be argued. I think you said it was a debateable premise. What did you mean by that?

A. What I meant was that while there are general features in terms of the kinds of psychoactive effects produced and the kinds of physiological effects that are seen among all known hallucinogens, there may be significant differences related to individual hallucinogens, as well.

Q. What types of differences?

A. Well, one example from the literature would be that LSD, for example, is associated with a strong tendency to produce tolerance. That is, increasing doses are needed to produce the same effect, or given the continued use at the same dose, the effect diminishes. A study by Strassman indicated that with repeated administration of DMT, * * *.

* * * * *

[831] that phenomenon or tolerance does not seem to emerge with respect to the psychoactive effects, although it does emerge with respect to some of the other physiological effects.

Q. Now, do these individual differences and specifically that difference make it impossible to view hallucinogens as a class?

A. No, not at all. The major defining feature of hallucinogens is the ability to produce the kind of effect that I was originally talking about, as well as the—chemical similarities, as well, contribute to a compound being placed in the class of hallucinogens.

Q. In the absence of direct information about a substance, is it standard practice to look at substances that are chemically and pharmacologically similar in order to assess health risks?

A. Absolutely.

Q. What substances do you include in the term hallucinogens?

A. Examples are LSD, psilocybin, mescaline, MDA, MDMA, DOM. There are a number of examples of classical hallucinogens.

Q. And is dimethyltryptamine one of them? I'm sorry, I think you already said that.

* * * * *

[832]

A. Yes.

Q. Now, is this classic hallucinogens subclassified in any way?

A. Yes, it is, and DMT falls in the same subclass of indolealkylamines as LSD and psilocybin.

Q. I'm sorry, you did say that. Your report goes into some of the adverse health consequences that have been observed with hallucinogens generally, and I won't repeat them all here. But I would like to have you explain what a couple of them are. The first one you mention is persisting perceptual disorder. Can you explain what this entails?

A. That has been seen with LSD, and that consists of what are commonly called flashbacks.

Flashbacks are a reexperiencing of some of the perceptual effects, normally visual effects, but often more

than visual effects. Often cognitive and affective components are present, as well. And it's a reexperiencing of those effects at times when there has not been any drug use.

Q. Now, you mention this has been observed in LSD. Has this been observed in any other hallucinogen besides LSD?

A. No.

* * * * *

[838]

A. Yes, it is.

Q. Why?

A. Well, because if someone were given a low dose on an ongoing basis and then suddenly were given a much higher dose, then they would experience significantly different effects. And because their expectations were to have the effects that they would have gotten at the lower dose, that might lead to anxiety, to panic, to other adverse reactions on their part.

Q. Do you have any reason to believe that the amount of dimethyltryptamine from dose to dose, from batch to batch, would be variable?

A. There have been—there has been at least one study that has found variability in the DMT content of the plants, the kinds of plants that are used in the preparation of hoasca.

Q. Suppose you knew that a mestre, one of the leaders of the church, drank some of the tea before giving it to the disciples in order to test its spiritual effect. Would that alleviate your concern?

A. It would modify it somewhat, but it's not clear to me that there has been any demonstration that the sensitivity of any individual or any group * * *.

* * * * *

[841] hallucinogens?

A. Yes, it is.

Q. How frequent are actual frank hallucinations from LSD?

A. They are relatively infrequent. Most often what you see with LSD are visual distortions or various forms of illusions.

Q. And how frequent is a loss of contact with reality with LSD?

A. It's infrequent.

Q. And has LSD been shown to generate some of the adverse psychiatric effects that you have mentioned?

A. Yes, it has.

Q. Do you know whether ayahuasca can cause hallucinations.

A. Yes, it can. The Riba study clearly demonstrates that ayahuasca can cause hallucinations.

Q. And I guess you have already talked about this a little bit, but I was going to ask whether you know whether hoasca, in the doses used by UDV, can cause hallucinations?

A. I believe that it did cause hallucinations in Dr. Grob's study, although they weren't fully * * *.

* * * * *

[842] formed hallucinations. They were visual changes in the absence of stimuli, and that then makes them hallucinations.

Q. How did the dose used in Dr. Grob's study compare with the doses used in Dr. Riba's study?

A. The dose used in Dr. Grob's study was approximately the same as the lowest dose used in Dr. Riba's study.

Q. And at that lowest dose, did Dr. Riba observe visual effects in the absence of stimuli?

A. Yes.

Q. Would set and setting having any impact on the potential for adverse effects?

A. Yes, absolutely.

Q. What did you know or what did you assume about the set and setting of the UDV when you wrote your report?

A. Well, initially I assumed that both the set and the setting were optimal with respect to the prevention of adverse effects.

Q. And is that basically your assessment, now that you have had a chance to learn more about the UDV?

A. Yes. The more I have learned about the UDV, the more I continue to hold that belief.

* * * * *

[843]

Q. And that belief is that the set and setting are optimal in content?

A. Yes.

Q. Why, then, would you still be concerned about the potential for adverse psychiatric effects?

A. Because I think it's a myth that the set and setting, even though optimal, can totally prevent adverse effects. You can minimize adverse effects by optimizing the set and setting, but I have had a number of patients describe the use of hallucinogens in optimal sets—with optimal sets and settings and still experience adverse effects.

Q. Are there certain populations of people for whom the adverse psychiatric effects—events that you list in your report are more likely to occur?

A. Yes.

Q. And what populations of people would those be?

A. These are people with previous histories of psychosis, with histories that suggest vulnerability to psychosis and with family histories of psychosis or that kind of vulnerability.

Q. Can stressful events trigger psychotic reactions in people with these underlying [844] vulnerabilities?

A. Yes.

Q. What about over-the-counter medications? Can they—can some of them trigger psychotic reactions in vulnerable people?

A. Yes, they can.

Q. Then why worry about hallucinogens?

A. Because hallucinogens have a stronger tendency to trigger psychotic reactions, and so you would expect to see a greater incidence of psychotic reactions in people who were otherwise less vulnerable

because of the stronger tendency on the part of the drugs to produce them.

Q. So how would the information that ordinary stressful events can trigger a psychotic reaction to people affect your assessment of the concern with hallucinogens?

A. If you look on vulnerability as a continuum, I mean those who are highest on the continuum, that is highest in terms of vulnerability, would require the least in the way of a precipitant to become psychotic. Those who are lower on the scale of vulnerability would require a stronger precipitant to become psychotic. Hallucinations—stressful events are among the [845] weaker precipitants. Hallucinogens are stronger on that scale of the ability to precipitate psychosis. So I would expect more people to be vulnerable to psychotic effects, given hallucinogens.

Q. What are the signs of an underlying vulnerability to psychosis? You may have already stated them. You said something about personal history. But I just want to make sure I have got them. What are the signs of underlying vulnerability to psychosis?

A. Previous history of psychosis is certainly a sign. Oddities of thought and behavior; for example, seclusiveness, a paranoid thinking, peculiarities in communication, social isolation or disconnectedness. I mean all of those suggest a higher vulnerability to psychosis.

Q. Can you screen for these vulnerabilities?

A. To some degree, you can.

Q. Can you effectively screen on all vulnerabilities?

A. No. As far as we know, there is no screening system that is just 100 percent effective.

Q. How would you go about attempting to screen out underlying vulnerabilities?

A. I would do a full psychiatric examination, * * *.

* * * * *

[851] dimethyltryptamine from the studies that have been done—

A. From the studies that have been done—

Q. —of dimethyltryptamine, just so that there is no confusion.

A. There has been at least one episode of reexacerbation or reemergence of depression in a subject in one of those studies. And also there have been cardiovascular changes consisting of increases in heart rate and increases in blood pressure. And in some subjects, the increases in blood pressure were such that it was felt to be medically appropriate to not continue that person as a subject in the study.

Q. In your report you talk about the transmethylation hypothesis of schizophrenia. Can you tell us what that is?

A. Yes. That is—it's the theory that endogenous substances, that is substances intrinsic to the body, have the ability—and DMT is one of those substances—have the ability to induce psychosis, and that in people with schizophrenia, one of the underlying physiological problems is that those substances are more active. There are either more of those substances intrinsically generated or * * *.

* * * * *

[860] is not really definitive.

Q. Well, by itself, could you rely on anecdotal evidence to establish the presence of adverse health effects?

A. You would really hesitate in terms of doing that because, with anecdotal evidence, there could be inaccuracies in reporting and there could be other factors operating that the anecdote does not relate. But it would certainly—anecdotal reports would certainly raise your concern about adverse health effects.

Q. What if anecdotal evidence is used in combination with epidemiological studies? Does that change its relevance, its degree of relevance?

A. Yes, it does. And in fact, often epidemiologic studies are undertaken because anecdotal evidence then becomes case reports and then becomes more controlled studies. And the evidence trail indicates that an epidemiological study would be warranted to look for the particular risk.

Q. What have you read, if anything, about the UDV system for monitoring instances of adverse health effects?

A. I have read a description, a DEMEC [861] description, of the UVD monitoring system.

Q. Was there anything about the monitoring system in Dr. Brito's deposition, which I know you said you read?

A. Yes, there was in that, as well.

Q. From what you read about it, would you expect this system to capture any and all serious adverse health effects?

A. No. I would expect a large degree of underreporting.

Q. Why is that?

A. Because there is a reliance on either self-report, and there are a lot of manifestations of problems that people tend to not self-report. And it also relies on observations by the mestres and by other people participating in the ceremonies of individuals. And there could be a lot of problems that are just not grossly obvious. Also, there is no—standards aren't set and maintained. I mean there is no monitoring of the monitors or any particular ongoing training of the monitors to be more sensitive to adverse consequences.

Q. Suppose you knew—well, okay. I'm sorry. So you just said that you wouldn't expect the system to capture any and all serious adverse [862] health effects. Are there any serious adverse health effects that this system has captured?

A. Yes. It has captured incidents of psychosis and it has captured the appearance of other psychiatric disorders, including incidents of depression and anxiety disorders. And it has also captured what are probably some drug interactions, and also I believe at least one incident of drug abuse that led to an adverse interaction with hoasca.

Q. Suppose you knew that the total number of psychoses or psychotic episodes reported by the UDV was on the low end, the very low end, of the average range in the Brazilian population. Would this remove your concerns?

A. I would still be concerned because from all of the descriptions I have read, Dr. Brito's deposition, the UDV, the DEMEC documents, Mr. Bronfman's deposi-

tion, the UDV screens out a certain number of people with vulnerabilities to psychosis and provides an environment that tends to encourage healthier behaviors and healthier life-styles and provides a level of social connectedness for the individual and support for the individual that—it's generally greater than the average [863] member of the general population. All of those factors would, I believe, tend to lower the expected incidents of psychosis a good bit below that in the general population. So the fact that the incidents of psychosis is still within range of the general population, in combination with the fact that a number of those incidents reported are attributed to the hoasca really strengthened my concern about the hoasca.

Q. You mentioned earlier that you thought there would be underreporting in the system. Do you think that would apply to the events of psychosis?

A. Yes, I do.

Q. Now, suppose I told you that several of the people who suffered psychotic episodes that were in some way connected by the UDV to some degree to the use of the tea are today still drinking hoasca, some of them in smaller doses and some in the full dose. As a psychiatrist and a specialist in the medical effects of drug use, what would be your response to that information?

A. I would consider that to be medically irresponsible for that to be allowed.

Q. Your ultimate conclusion in your report is that hoasca use cannot be considered safe outside of * * *.

* * * * *

[871] that from the UDV, did he?

A. No.

Q. He got that from another organization, correct?

A. Uh-huh.

Q. And he encapsulated it, and that is what he used for his subjects, correct?

A. Yes.

Q. And then the placebo was some kind of a white powder, correct?

A. Yes.

Q. So the encapsulated stuff was encapsulated plant material, right? And then—

A. Uh-huh.

Q. Okay. Now, in fact, the DMT in the concentration, in the samples he received, were twice as great as the amount reported in the Grob study, correct? The Grob study reported DMT at .24 milligrams per milliliter?

A. Uh-huh.

Q. And in his study, it was .5, .50 milligrams per milliliter, correct? That is what it says here, right here?

A. Yes. That's true, but —

Q. Okay. Let me — that is the answer to [872] that question. I am going to ask you another question.

A. All right. All right.

MS. GOITEIN: I object. I think the witness wasn't through answering the question.

MS. HOLLANDER: Well, I think the witness— Your Honor, he answered my question. My question

was simply: What was the amount in the Grob study and what was the amount in the Riba study?

MS. GOITEIN: He clearly had a further explanation.

MS. HOLLANDER: Fine.

MS. GOITEIN: I think he should be permitted to finish his sentence.

THE COURT: Did you wish to explain your answer?

THE WITNESS: Yes, I did.

THE COURT: All right.

A. The Grob study administered 2 milliliters per kilogram, which then doubled the .24 to .48, which is close to the .50.

Q. (By Ms. Hollander) All right. Now, I didn't ask you how much they administered. My question was: What was in the substance that they [873] initially seized? And I didn't ask you about milligrams per kilogram. I asked you about milligrams per milliliter, didn't I?

A. Yes.

Q. Thank you.

MS. GOITEIN: Your Honor, I object. This is argumentative. The witness is trying his best to answer her questions.

MS. HOLLANDER: I just want to be straight what my question is, Your Honor, and I am going to ask him another question.

THE COURT: Please do.

MS. HOLLANDER: Thank you.

Q. (By Ms. Hollander) Now, in the Grob study, the amount given to individuals was .48 milligrams per kilogram, right?

A. Correct.

Q. And in the Riba study, the lowest amount was .50 milligrams per kilogram, and the highest amount was 1.0 milligrams per kilogram, correct?

A. Correct.

Q. The Riba study, therefore, started at as lightly higher, but probably not much—basically the same, close to the same as the Grob study, but then doubled, correct? They doubled it for their [874] third dose?

A. Yes, yes.

Q. And the Riba study had—according to the Riba study, the initial material that he started with had a higher does of beta-carbolines, correct? That is what he says in here?

A. Yes.

Q. So you would agree that he says the DMT concentration found in the tea was twice as great as the amount reported for a sample of hoasca from the Brazilian church, the Uniao do Vegetal, correct?

A. That's correct.

Q. And similarly, the beta-carboline concentrations found in the ayahuasca used in the present study were also higher than those reported in the previous mentioned—previously mentioned samples, correct?

A. Correct.

Q. Now, he also reported that even at the highest levels that he gave, the volunteers did not experience

the overwhelming effects reported for the highest dose used by Strassman, correct?

A. That is correct.

Q. And the highest dose used by Strassman was .4 milligram per kilogram intravenous, correct?

[875]

A. That is correct.

Q. So out of his six people that he studied—with no controls, correct? And by the way, this was not in a religious context, was it?

A. No.

Q. No. These were just people who came in and took the capsules, right?

A. That is correct.

Q. We don't know anything about them baseline, do we, baseline before they started taking drugs?

A. No.

Q. And we really don't know anything about their drug history, do we, except the minimal amount that is in this study, correct?

A. That is correct.

Q. That they were all experienced drug users?

A. Yes.

Q. And we know that one person withdrew, right? One person had a period of anxiety and withdrew from the study. So he ended up with only five people in the study that you relied on, correct?

A. That is correct.

Q. But even that person who withdrew, the [876] anxiety was transient, wasn't it?

A. Yes.

Q. And with verbal support, he was able to leave that day without any further problems that we know of, correct?

A. That is correct.

Q. And in fact, at the end of each of these days, the subjects were given self-report questionnaires, weren't they?

A. Yes.

Q. And they were given those approximately four hours after they took the—whatever dose they took, correct?

A. Yes.

Q. And the researchers felt that these individuals were sufficiently lucid to answer their questions after four hours, correct?

A. Yes.

Q. And then they had a light meal if they chose, correct?

A. Yes.

Q. And then they were discharged out into Barcelona, Spain, five hours after, correct?

A. Yes.

Q. And that even included the days when they [877] received a dose that was double the dose in the Grob study, correct?

A. Yes.

Q. Now, when they took this substance in capsule form, they only experienced mild nausea, except for one person who vomited at the highest dose, correct?

A. Yes.

Q. And you have also mentioned that you were concerned about electrocardiogram changes, and you mentioned that from Brito?

A. Yes.

Q. But in the Riba study, they found no statistically significant blood pressure changes, did they? That is what he says, right, "The changes in blood pressure were not statistically significant"?

A. Uh-huh. Yes.

Q. And they found no clinically relevant changes in biochemical parameters, correct?

A. Yes.

Q. And at the medium dose, which was already higher than the UDV's dose, the subjects all said the experience was similar to dreaming, correct?

A. I don't think it's reasonable to infer [878] that it's higher than the UDV's dose. It is higher than the dose that Dr. Grob administered in his study. What the UDV's dose is—or what the range of doses that the UDV uses, as far as I am concerned, has not been documented.

Q. So you don't know what it is other than Grob's study, right?

A. That is correct.

Q. That is the only evidence that you have of what it is, correct?

A. Yes.

Q. Now, I want to talk for a minute about—you have mentioned one of your concerns about Dr. Brito mentioning these heart problems. Dr. Brito found that there were eight alterations, cardiac alterations, that do not correspond to heart disease, didn't he? That is what he said, didn't he?

A. Well, there were—

Q. Let me just ask you to just answer.

A. Yes, that is what he said.

Q. That is what he said?

A. Yes.

Q. And that four of them were a slower heart rate, correct?

[879]

A. Correct.

Q. And that is not necessarily indicative of heart disease, is it?

A. No, not necessarily. But it's not inconsistent with heart disease, either.

Q. It's not? But now you are not saying that, based on this study of Grob's that you considered preliminary and a pilot study, that you can determine that there is a heart problem from hoasca, are you?

A. No, I am not saying that. But what I am saying is that, given the paucity of information that we have, the information that we do have is consistent with my concerns.

Q. Consistent with your concerns, and you would like to see more studies?

A. I really would.

Q. But you don't have any evidence about which you can say, to a reasonable degree of scientific certainty, that there are cardiac irregularities associated with the use of hoasca, do you?

A. No.

Q. And in fact, Riba's study on which you rely didn't find any, did he?

* * * * *

[893] they?

A. That is correct.

Q. And no one at NIDA has ever undertaken them, either, have they?

A. That is correct.

Q. Now, you have also mentioned the DEMEC documents that you reviewed.

A. Yes.

Q. And I want to talk about those a little bit. We need to get some definitions straight here.

When you refer to psychosis, are you referring to what is known in your field as an intractable schizophrenic-like event, or are you referring to a transient psychotic episode?

A. Psychosis—the term psychosis doesn't specify either length or treatability. The term psychosis refers to that—to that mental state of loss of contact with reality as manifested by such phenomena as hallucinations, delusions, difficulty with logical thinking, loosening of associations to point of tangentiality and lability of affect.

Q. And you would agree with me, I assume, that people can have, in their lives, one or two transient psychotic episodes that are never repeated, correct?

* * * * *

[894]

A. Yes, that is possible.

Q. And these can be precipitated by any number of factors, correct?

A. Correct.

Q. They can be precipitated by a dramatic change in one's life, for example a major breakup or a major grief reaction, correct?

A. That is correct.

Q. And it can be precipitated even in a vulnerable individual by some external stimuli, for example, a movie, correct?

A. Yes, that is correct.

Q. And it can be as a result of intense psychotherapy, correct?

A. That is correct.

Q. Certainly sometimes no treatment is necessary, correct?

A. That is correct.

Q. The person recovers, and the rest of his life he is just fine, right?

A. I don't think that we have had significant follow-up of those who have had single transient psychotic episodes or several transient psychotic episodes so as to be able to respond to whether a person, for the rest of

his life, will be okay. I [895] would be concerned that if a transient psychotic episode were precipitated by one set of stressful life events, that that would signify that if the person had similar stressful life events at other points in their life, that they would be vulnerable to reexperiencing the psychotic episode.

Q. But you have never done any research along those lines, have you?

A. No.

Q. Now, you certainly agree that the use of alcohol can precipitate a psychotic event, correct?

A. Yes.

Q. Would it be safe to say that there are people who have lived—consumed too much alcohol, had psychotic events, and then gone onto live the rest of their lives without a recurrence of the psychotic episodes?

A. That is reasonable. Yes, I think that is safe to say.

Q. And in looking at the DEMEC documents, you said you looked at 24 documents. But not all of those people had what we would refer to as extended long-term psychosis, correct?

A. That is correct.

Q. And in fact, in the population at large, [896] there will be some people who will have a long-term intractable psychosis that will appear, and sometimes you can't determine what the triggering event was, correct?

A. That is correct.

Q. And you also mentioned that you looked at the people who were being monitored who were on SSRIs?

A. Yes.

Q. And of that group—in fact, that group were really not having—they didn't find any serotonin syndromes, did they, out of that group?

A. No.

Q. Even though they had been monitoring them steadily, correct?

A. As—well, yes. As far as I understand, yes.

Q. And in fact, isn't it true, Doctor, that not every one who combines MAOIs and SSRIs is going to have a serotonin syndrome, correct?

A. Yes, that is correct.

Q. It's really pretty rare, isn't it, serotonin syndrome?

A. It is rare. But perhaps one of the reasons it's rare is that very few people combine [897] MAOIs and serotonin—serotonergically-active medications because, as is indicated clearly in the PDR under both sets of medications, it's totally contraindicated.

Q. But the cases that you see, by and large, are the cases where there have been MAOIs that were prescription drugs mixed with SSRIs, correct?

A. Yes, that is correct.

Q. So there is some number of physicians who are not aware of this, correct?

MS. GOITEIN: Objection, Your Honor, calls for speculation.

THE COURT: I will let him answer if he knows.

A. Well, while it is speculation, I would say that it's reasonable to say that. However, there are other

circumstances. For example, someone may get medication from two physicians, neither of which knows that the other has prescribed medication.

Someone could take another person's medication or could take a previously-prescribed medication that they have just kept, even though they were no longer supposed to take it. So there are a lot of circumstances other than a physician not knowing about the interaction that could lead to someone * * *.

* * * * *

[912]

A. No, I wouldn't expect that.

Q. And you wouldn't expect that if they were doing the investigation with mescaline, either, would you?

A. No.

Q. You devote three full paragraphs of your report, paragraphs 21, 22 and 23, to a discussion of irreversible MAOIs, correct?

A. That is correct.

Q. Yet no evidence exists that hoasca contains irreversible MAOIs; isn't that true?

A. That is true.

Q. In fact, the evidence is clearly that hoasca contains reversible MAOIs, correct?

A. Correct.

Q. And you will agree that there is a difference between reversible and irreversible MAOIs, correct? There is a difference, isn't there?

A. There is a difference, but the difference doesn't obviate the concerns. It doesn't make the concerns applicable to irreversible MAOIs totally and applicable to reversible MAOIs.

Q. Well, I am correct, am I not, that there are no published studies on ayahuasca regarding the extent of MAO inhibition to reversibility and * * *.

* * * * *

[922] anti-HIV activity. If you would like, I can give you that citation."

So we did make the government aware of this, had they been interested in pursuing it. I will let counsel look at mine, Your Honor.

MS. GOITEIN: Your Honor, I think you understand my objection.

THE COURT: Did you want to follow up with another question?

MS. HOLLANDER: Yes. I just have one more question, Your Honor.

Q. (By Ms. Hollander) Assume as a hypothetical, Dr. Genser, that there is some data suggesting that harmala alkaloids may actually have anti-HIV activity. Assume that that data exists.

A. Okay.

Q. Then you would form a hypothesis, would you not, that that is something—or strike that. You would then want to look into that possibility, wouldn't you?

A. Yes, absolutely.

Q. You're familiar with Dr. Schuster, are you not?

A. Yes.

Q. He was the director of NIDA?

[923]

A. Uh-huh.

Q. Was that during a time while you have been there?

A. Yes.

Q. So is it fair to say he was your boss?

A. Yes.

Q. And he was—

A. He was two layers above.

Q. Because he was the director of the whole thing?

A. Right.

Q. And are you aware that he is also—are you familiar with the College on Problems of Drug Dependence?

A. Yes.

Q. Are you familiar that he is also the president of that organization for two years?

A. Correct.

Q. And I assume you would agree that Dr. Schuster is one of the leading pharmacologic researchers in the area of substance abuse, correct?

A. Correct.

Q. You would certainly consider him reliable, wouldn't you, his work, his research?

A. Yes.

[924]

Q. Now, Dr. Genser, you are familiar—let me ask it this way: You would agree with me that there are other religious practices that have some risk, correct?

A. That is correct.

Q. For example, the Jehovah's Witnesses don't believe in blood transfusions, correct?

A. Correct.

Q. And that could be life-threatening in some circumstances; isn't that right?

A. Yes.

Q. And are you familiar with the fact that members of—or certainly some members of the Church of Christian science don't believe in getting any medical attention?

A. Yes, I am aware of that.

Q. And they believe that all cure comes about through prayer, correct?

A. Correct.

Q. And in fact, I assume that you are aware of the fact that there have been studies that people praying for other people actually has had some beneficial effect?

A. I am aware of those things.

Q. And you aware of the fact that the Jewish [925] faith requires infants to be circumcised, correct?

A. Correct.

Q. And that is done on an infant that is less than a week old, correct?

A. Yes.

Q. This is a surgical procedure, correct?

A. Yes.

Q. And it is often done outside a hospital, in a home, correct?

A. That is correct.

Q. In fact, under some religious practices, it must be done outside a hospital, correct?

A. Yes.

Q. And it's performed by a religious person who is not necessarily a doctor, correct?

A. That is correct.

Q. And this infant just a few days old actually is given a very small amount of alcohol, correct?

A. Yes.

Q. In fact, that is the only anesthetic that the infant gets; isn't that right?

A. Yes, that is correct.

Q. Now, if in fact the infant has a bleeding problem like hemophilia, circumcision can be fatal, [926] can't it?

A. Absolutely.

Q. And you are aware of cases where it has been fatal?

A. Yes.

Q. You are not aware, are you, of any requirement that—any legal requirement that infants be tested first before they are circumcised? You are not aware of any legal requirement of that, are you?

A. No, I am not.

Q. Now, I assume that in doing your analysis, you considered both the health risks and the possible health benefits of hallucinogens, correct?

A. I was particularly concerned about the health risks. I didn't discount the possibility of health benefits. But a lot of substances and a lot of practices involve both risks and benefits. I was asked to focus on the risks, and I did that.

Q. But you are aware—but in focusing on the risks—well, let me put it another way. When you consider the health risks of a substance, you can't ever consider them just in a vacuum, can you? For example, let me give you an example of what I mean. In the medical context, when we are talking [927] about a drug that—for example, an FDA trial—

A. Uh-huh.

Q. —the clinical trials have to consider both risks and benefits, don't they?

A. That is correct.

Q. And there are drugs that are on the market that I am sure you would agree have tremendous benefits and also provide—can cause serious harm, human—harm to human health, correct?

A. That is correct.

Q. And sometimes people take these medicines knowing that there is some risk, but it's outweighed by the benefit, correct?

A. That is correct, although I have to say also you mention the FDA. The FDA process requires the demonstration of a significant degree of safety before

issues of efficacy, which presumably contain that the benefits are explored.

Q. And that is for drugs. Now, the FDA doesn't control over-the-counter remedies such as St. John's Wort, correct?

A. That is correct.

Q. Or things like Ginko biloba, correct?

A. Yes.

Q. Let me put this another way. Every time [928] you cross the street, you are presented with a risk, aren't you?

A. Yes.

Q. A risk that you could get killed by a car that speeds up and hits you, correct?

A. Correct.

Q. We don't tell people, "You can't cross the street to get to church because you might get hit on the way," do we? We don't tell people that, do we?

A. No.

Q. But presuming there is a benefit in getting to the church, we let people take a certain risk in getting there, correct?

A. Correct.

Q. Now, you are aware—I am sure you have seen or have some experience with the Pentecostal movement. Is there anyone who hasn't seen them on television where people stand up and someone says something and hits them and they fall down into the arms of someone?

A. I have seen that, yes.

Q. You know what that is?

A. Yes.

Q. And in fact, when these people are collapsing, they would actually fit your definition [929] of a temporary psychosis, wouldn't they?

A. I couldn't say that.

Q. Well, if somebody is talking in tongues, that person would fit your definition of being—being divorced from reality; isn't that correct?

A. Not necessarily, no.

Q. But they could be, couldn't they?

A. Possibly, but not necessarily.

Q. And you would agree, would you not, however, that—let's go back to substances a minute—that St. John's Wort can cause serious medical problems; isn't that correct?

A. Yes.

Q. In fact, the literature shows a serotonin syndrome from St. John's Wort without any other interaction, correct?

A. That is correct. And a—well—

Q. That is correct, isn't it?

A. Yeah. Can I enlarge on that?

Q. Certainly.

A. Yeah. In fact, St. John's Wort contains hypericin, which is a reversible inhibitor or MAO.

And the fact that serotonin syndrome has been observed with St. John's Wort validates the concern

that I have about serotonin syndrome with the [930] reversible inhibator of MAO contained in hoasca.

Q. And this has been said about St. John's Wort for some time, hasn't it?

A. Yes.

Q. It's still on the shelves, isn't it?

A. It is.

Q. You can buy it in any grocery—any health food store for sure, can't you?

COURT REPORTER: You have to answer out loud.

A. Oh, sorry. Yes. Thank you.

Q. (By Ms. Hollander) Are you familiar with dextromethorphan?

A. Yes.

Q. And that is contained in Nyquil, isn't it—

A. Yes.

Q. — and Robitussin cough medicine—

A. Correct.

Q. —to give two examples we would know about?

A. Correct.

Q. And there have been serious drug interactions with dextromethorphan also, haven't there?

[931]

A. Yes, there has been.

Q. And that is still on the shelf, isn't it?

A. It is.

Q. Even though that has been known for over two years, correct?

A. That is correct.

Q. You have certainly known about it?

A. Yes.

Q. Aspirin can cause Rieyes syndrome, correct?

A. Yeah. Rieyes Syndrome, yeah.

Q. R-I-E-Y-E-S? Is it pronounced Rieyes Syndrome?

A. Yes, it is.

Q. And that is a very dangerous syndrome for young children, correct?

A. Absolutely.

Q. And we hope that parents know this, don't we? We hope that parents know that they are not supposed to give their children aspirin, correct?

A. Yes.

Q. But aspirin is available over the counter for anyone, correct?

A. Yes, it is.

Q. There is no obligation that you be able to [932] read or write to buy an aspirin, is there?

A. That is correct.

Q. There is no one standing at the aspirin counter saying, "Don't buy this if you have children," is there?

A. No.

Q. You're aware of serious interactions with Ginko biloba, aren't you?

A. Yes.

Q. And that can cause problems with someone taking an anti-clotting drug?

A. Yes, it can interfere with the clotting mechanism.

Q. And in fact, spinach can interfere if someone is taking an anti-clotting drug, too; isn't that true?

THE COURT: What did you say?

MS. HOLLANDER: Spinach.

THE COURT: Oh, spinach. I'm sorry. Excuse me.

Q. (By Ms. Hollander) Or broccoli, correct?

A. Yes.

Q. Now, those risks are well known, aren't they, to you?

A. To me they are.

[933]

Q. They are not necessarily well known to the general public, are they?

A. That is correct.

Q. They are not necessarily known to all doctors, either, are they?

A. I assume that that is true, yes.

Q. So every time someone goes to a doctor and gets one of these drugs that these over-the-counter remedies interacts with, you can't be sure that the doctor is telling them all the things they shouldn't consume, can you?

A. No, you can't be sure.

Q. And in fact, one other example that we have talked about is grapefruit juice, correct?

A. Yes.

Q. Grapefruit juice reacts at the P-450 site; isn't that correct?

A. Uh-huh.

Q. And if somebody is taking any number of prescription medications, the grapefruit juice interaction can inhibit those drugs; isn't that right?

A. Well, it can inhibit the—

Q. The absorption?

A. —the metabolism—

[934]

Q. The metabolism of those drugs?

A. Right—such that the levels of the drugs become a lot higher than one would normally expect.

Q. And that is a serious problem, isn't it?

A. Yes.

Q. Particularly if someone has high blood pressure, right, because one of those drug is Procardia; isn't that right?

A. Yeah, absolutely.

Q. Now, then, to go back to where I started this discussion, which was that you have to—you have to weigh the benefits—in other words, those drugs like Procardia and Prozac and Coumadin have certain substantial benefits, don't they?

A. Yes, they do.

Q. Even though we all know that there are risks of certain interactions, correct?

A. Correct.

Q. So when you are looking at the health risks of hallucinogens, I assume you're aware that there has been evidence of health benefits of hallucinogens, correct?

A. I have not explored the health benefits issue, as I was not asked to do that kind of analysis. I am, however, aware from having read [935] Dr. Grob's study, as well as other studies, that there is a thread in the literature attributing positive benefits to the use of hallucinogens.

Q. And in fact, you're aware of a study that NIDA is currently involved in involving the hallucinogen mescaline, correct?

A. That is correct.

Q. And that is a study that is being done by someone named John Halpern and someone named—I don't know his first name, but his last name is Dr. Pope, correct?

A. Harrison Pope.

Q. Harrison Pope, correct?

A. Yes.

Q. And you have actually reviewed that study to some degree, haven't you?

A. Yes.

Q. And that is a study that was first done through the assistance of the Heffter Institute, correct?

A. I wasn't aware of that.

Q. But it wouldn't surprise you, would it?

A. No.

Q. Okay. And this—now, this is the first time, to your knowledge, that—and this is a NIDA [936] study that Drs. Halpern and Pope are doing, aren't they?

A. Yes.

Q. And this is a study that has already obtained pilot data assessing the neuropsychological performance of 42 Native Americans, correct?

A. That is correct.

Q. But to your knowledge, this is really the first study of its kind at NIDA, isn't it, of this type?

A. Yes. As far as I know, yes.

Q. But you do know, don't you, that back in the '70s, some other studies were done on peyote, correct?

A. I am aware of more ethnographic kinds of studies having been done with peyote in the '70s, but I haven't looked at that literature for some time. I would have to—

Q. You're familiar—

A. Go ahead.

Q. I'm sorry, I didn't mean to interrupt you. Are you finished?

A. Oh, that's fine.

Q. You are familiar with Karl Menninger?

A. Yes.

[937]

Q. And who is he?

A. He is one of the—well, he is the founder of the Menninger Clinic, which has been one of the premiere hospitals with respect to psychiatric care and psychiatric research for a number of years.

Q. And would it surprise you to know that Karl Menninger, in the early '70s, said that, "Peyote is not harmful to people in the Native American Church; it is beneficial, comforting, inspiring and appears to be spiritually nourishing"?

A. No, it wouldn't surprise me.

Q. Would you consider his statements to be reliable, Dr. Menninger's?

A. What do you mean by "reliable"?

Q. Well, would you rely on Dr. Menninger? If he said something like that, would you think that he had a basis for saying it?

A. I would think that he had a basis for saying it.

Q. And I assume that you're aware of the fact that peyote is a Schedule I controlled substance?

A. I am.

Q. And are you aware of the fact that mescaline is a Schedule I controlled substance?

[938]

A. Yes.

Q. And you—I assume that you have talked about how, in the UDV, you can't really determine what the dose of DMT is in a given plant mixture, correct?

A. Yes, that is correct.

Q. And when people attend Native American Church ceremonies, there is nobody who figures out

what the dose of mescaline is in a particular peyote button, either, is there?

A. As far as I am aware, that is correct.

Q. And in fact, when comparing hallucinogens, peyote is a plant with an active ingredient that has hallucinogen, correct?

A. Correct.

Q. And Psychotria Viridis is a plant that has an active ingredient, DMT, correct?

A. Correct.

Q. So there is some benefit or some reason to compare them, correct? It's not an invalid comparison, except for the addition of the MAOIs, correct?

A. That is a big "except," but they certainly are similar in both being plants that contain hallucinogens.

[939]

Q. All right. And LSD doesn't contain any MAOIs, either, does it?

A. No.

Q. And you compared hoasca to LSD, correct?

A. Correct.

Q. But you could compare it to mescaline, too, couldn't you?

A. Yes.

Q. And you haven't taken the position that the Native American Church ceremony should be closed down until research is done, have you?

MS. GOITEIN: Objection, Your Honor. This witness is not a representative of the government. He

doesn't close down organizations. He is here to testify about the medical consequences. This is far beyond the scope of his direct testimony.

THE COURT: Instead of asking it that way, I will permit you to ask him about his personal views on why one is treated different from the other, or should be.

MS. HOLLANDER: Thank you Your, Honor.

Q. (By Ms. Hollander) Let me ask you to answer the question that Judge Parker asked you. In your personal view, is—you know that none of these studies—no studies have been done on peyote [940] use by the 250,000 members of the Native American Church, correct?

A. As far as I am aware, yes.

Q. In your opinion, should the Native American Church no longer be allowed to continue its ceremony until these studies are done?

MS. GOITEIN: Your Honor, I have to object. Not only is this irrelevant, but he also hasn't offered any testimony that the UDV shouldn't be allowed to use hoasca. His testimony is very narrow. It's on the health effects of hoasca. I don't, in this context, have any problem with Ms. Hollander asking him about the health effects of peyote, although I think he said that he hasn't researched it in a while. I don't have problems on that narrow subject. To ask him whether he thinks that one or the other should be illegal or shouldn't be illegal, that is far beyond the scope of his expertise and his direct testimony.

THE COURT: Well, I think it is important for him to be able to answer what he considers to be the

difference in the effects of one or the other. What conclusions he draws about whether one or the other should or should not be regulated by reason of differences or lack of differences, I guess—[941]

MS. GOITEIN: Your Honor, I don't have a problem with his testifying about the health effects of peyote to the extent that he knows, although he didn't—wasn't presented as an expert in that. I don't mind questions about the health effects, but I do mind and object to questions about what legal action should be taken or not taken. That is not his expertise, and it's beyond the scope.

THE COURT: Why don't you first address the issue of his knowledge about the difference of the effects of one or the other, peyote or hoasca tea? And I will let you ask him, for whatever it's worth—because I may not make much use of it, but I would be interested in knowing what his personal views are about whether one or the other or both should be regulated.

MS. HOLLANDER: Thank you, Your Honor.

Q. (By Ms. Hollander) You were presented as an expert in drug abuse; isn't that correct?

A. That is correct.

Q. You were asked numerous questions about the hallucinogens, correct?

A. Correct.

Q. And you seem to know something about the hallucinogens, correct?

[942]

A. Correct.

Q. And you do know something about their effects, don't you?

A. Yes. Correct.

Q. And that would include mescaline, wouldn't it?

A. Yes.

Q. Now, mescaline, in your view, can cause people to have—well, let's see. Let me ask you, what are the—what are the effects of mescaline that are you aware of?

A. Well, mescaline, as far as I am aware of, is a classical hallucinogen, and as such causes people to experience visual phenomena, illusion, going all the way on up to frank hallucinations, as well as cognitive and affective and experiential changes that are consistent with what have been incorporated into the Hallucinogen Rating Scale.

I would say that that rating scale, the hallucination—yeah, that that rating scale would be just as valid in describing the mescaline experience as in describing the hoasca experience or a DMT experience.

Q. So all the concerns that you raised about LSD—I am now putting aside the MAOs—all the [943] other concerns you have raised could be equally raised for mescaline as they are for DMT, correct?

A. That is correct.

Q. Do you have any reason to believe that the risk/benefit analysis in the use of peyote in the Native American Church would yield any different result than the risk/benefit analysis of hoasca when used as a sacrament within the UDV?

A. I can't respond to that because I haven't addressed the benefits issues. You're talking about risk/benefit analysis.

Q. Well, surely when determining—I mean I don't want to go back over this again. But assuming that everything we do in life has a risk, isn't the benefit part what you have to determine when you say something has a health risk?

A. If you're making a decision with respect to do something or to advocate that something be done, then yes. But that is not what I was asked to do with respect to this issue.

Q. Did you look at all into—so you didn't look into any question of whether any of the hallucinogens had any benefits before making your opinion here?

A. No. I looked independently at risks.

[944]

Q. Just by itself, without any scale?

A. Without any scale?

Q. Without putting it on a scale and saying, "Maybe the risk is a little bit or maybe the risk is a lot"?

A. Well, I tried to quantify the risk as far as the data would allow me to, but there wasn't enough data to permit much in the way of quantification.

Q. Well, you did say earlier that you can extrapolate from what you do know about the other hallucinogens, correct?

A. Correct.

Q. Okay. And so I take it that in doing—that you looked at the extrapolation of the known evidence about peyote and for—and I would like to ask you if, in fact, you agree with the congressional findings that, "Medical evidence based on scientific studies and opinions of scientific and other experts, including medical doctors, former directors of the Indian Health Service and ethno"—I can't even get this right.

A. Ethnographic?

Q. Ethno—yeah, but it's, "Ethnopologists clearly demonstrates peyote is not injurious to the [945] Indian religious user, and in fact is often helpful in controlling alcoholism and alcohol abuse among Indian people. Ingested as a solid or tea in strictly prescribed and controlled religious ceremonies, the sacrament is neither addictive nor habit-forming. Courts which have made factual findings regarding the religious use of peyote by Indians have concluded that such use is not harmful."

MS. GOITEIN: Your Honor, I am going to object to reading that for any purpose into the record without some identification of what it is. I mean I basically know what it is. But for the record, I think we need to know what she is reading from specifically, because this is an excerpt taken out of a much larger context.

MS. HOLLANDER: Well, I was going to get there, Your Honor, but I was asking him if he was aware of this knowledge about peyote.

THE WITNESS: Aware of what?

Q. (By Ms. Hollander) Do you agree with what I just read?

A. I understand the conclusion. I know that the conclusion is valid as far as the data has gone. But I think we need some additional data with [946] respect to the peyote, and that is why NIDA is sponsoring this study, to begin to gather the additional data that we need for a more refined assessment of those issues.

Q. But in your report, in your deposition, and in your testimony, you chose to look at LSD, didn't you? Didn't you?

A. Yes.

Q. And you never mentioned that there is medical evidence based on scientific studies and opinions, including medical doctors, that clearly demonstrates peyote is not injurious to the Indian religious user? You never mentioned that, did you?

A. Well, the quality—I looked at LSD because the quality and extent of the research on LSD far exceeds that of peyote.

Q. But you didn't even look into this evidence about peyote, did you?

A. No, no.

MS. HOLLANDER: And Your Honor, I would ask the Court—since Ms. Goitein wants this identified, I would be happy to do that, and I would be happy to mark this as Exhibit 118. And I would ask the Court to take judicial notice of this as legislative fact. This is the House Report No. 103- [947] 675, August 5, 1994, to accompany House Report 42-30 which ultimately became public law 103344, the American Religious Freedom Act Amendments of 1994. And I would move the admission at this time.

THE COURT: Ms. Goitein?

MS. GOITEIN: I'm sorry. No objection, Your Honor.

THE COURT: Okay. Exhibit 118 will be admitted without objection.

Q. (By Ms. Hollander) Now, LSD is a chemical, isn't it? It's not a plant?

A. Yes.

Q. And as far as you know, it's not used in any ritual context, is it, as far as you know?

A. Not as far as I know.

MS. GOITEIN: Your Honor, I apologize for interrupting. We expected this witness to be done. He has a flight this afternoon that we've scheduled for him. But I do need to quickly talk to him to make sure that those arrangements are satisfactory. It will take 30 seconds.

THE COURT: Sure.

MS. HOLLANDER: I am almost finished also, Your Honor.

THE COURT: What time does he have to get [948] his flight?

MS. GOITEIN: It's at 4:45. I apologize.

Q. (By Ms. Hollander) Given the fact that hoasca is a sacrament of the UDV and peyote is a sacrament of the Native American Church, isn't it fair to draw comparisons between those two rather than just between a chemical not used as a sacrament, LSD, and hoasca?

MS. GOITEIN: Objection, Your Honor. This is going again beyond the expert's expertise. He is not

testifying about what is a sacrament or not a sacrament. He is testifying about the medical effects. This is just—this is beyond his expertise.

MS. HOLLANDER: I think it goes to his bias, Your Honor. It goes to why he chose LSD and did not choose mescaline as the one to compare.

MS. GOITEIN: He has already stated why he chose LSD. It's a way to try to introduce the legal questions, and it's—this goes beyond the expert's expertise.

THE COURT: Well, why don't you ask him whether the fact that one is used as a sacrament and the other is not influenced his decision to compare LSD as opposed to hoasca?

[949]

THE WITNESS: No, it didn't influence my decision. My decision to look at LSD was based solely on the greater extent of the body of research performed on LSD.

Q. (By Ms. Hollander) But you do consider this body of research on peyote to be relevant here, don't you?

A. I can't say it's not relevant. I am just saying it's not nearly as extensive as the body of research on LSD.

Q. You testified that set and setting are critical, correct?

A. That is correct.

Q. So in looking at how a substance is used, it would be relevant, would it not, to look at a substance that is used in a similar set and setting, correct?

A. It would be—it would be a way of controlling for set and setting in evaluating or a way of—well, I guess controlling for set and setting is a good way of putting it. So it would be—it would be a reasonable thing to do, but not necessarily relevant to assessing the full range of potential health risks.

Q. You don't think that we should ignore what [950] has been stated about peyote, do you?

A. No, not at all, not at all.

Q. But you didn't look into it?

A. No.

Q. Now, according to Plaintiffs' Exhibit 118, it says that, "The religion"—and it's quoting from actually—this is part of the record. It's quoting from the Federal District Court in New Mexico, the 1986 case of Toledo vs. Nobel-N-O-B-E-L, Sysco, Incorporated, S-Y-S-C-O, 651 F. Supp. 483 District of New Mexico, 1986, a case that held that, "The religious use of peyote was not illegal." And in Plaintiffs' Exhibit 118 is the quote that includes the fact that, "The Native American Church encourages love of parents and obedience to parents, fidelity to a spouse and charity towards others." You wouldn't deny that those would be benefits, would you?

A. No.

MS. GOITEIN: Your Honor, to the extent that this witness has already talked about the limitations of his knowledge about peyote, it has become increasingly clear that Ms. Hollander is reading this into the record for the truth, not for [951] any purpose to see whether if Dr. Genser is aware or what he thinks about it, and I would object to this as a very thinly veiled attempt to get hearsay into the record.

THE COURT: What is the next question?

MS. HOLLANDER: I am right at the end, Your Honor, if I could just finish.

THE COURT: Okay.

MS. HOLLANDER: Well, I have a few more questions.

Q. (By Ms. Hollander) You said earlier that your concern about hoasca in the UDV had been raised somewhat by the anecdotal evidence you received from Dr. Brito and the DEMEC documents, correct?

A. That is correct.

Q. In fact, if you also—did you also take into account that over a million doses of hoasca had been given over the last few years, and there is no evidence of which you are aware of harm? That would be anecdotal evidence that you would have to consider, too, wouldn't it?

A. No. That is—the monitoring system has only been recent, and I believe that there are significant problems with the monitoring system. So however many doses have been administered, if they [952] haven't been adequately monitored, it's not possible to draw any conclusion from them.

Q. But you can't draw any negative conclusion, either, can you?

A. No.

Q. And finally, Doctor, you don't consider the use of hoasca within the religious context of the UDV to be drug abuse, do you?

A. No, I don't.

MS. HOLLANDER: I have nothing further, Your Honor.

THE COURT: Any redirect examination?

REDIRECT EXAMINATION

BY MS. GOITEIN:

Q. Dr. Genser, you said that Dr. Grob's study is too small to establish ayahuasca safety. And yet you have relied on yet a smaller study, Riba's study, to provide information about adverse effects. Can you explain this?

A. Yes. In order to establish that something is reasonably safe over the range of possible adverse effects, you need to have a large-scale study covering either a sample of the total population that has been or would be exposed to the substance, and the sample has to be large enough so [953] that one would expect significant numbers of effects to appear if they were present. And if they did not appear, then it would be reasonable to conclude, with a certain—with a degree of certainty that the substance was safe.

However, with a small number of individuals, if you get one negative effect, you know that that negative effect occurred and you know that—you know then that it's possible, so that that would then raise your level of concern with respect to how frequently it does occur in the general population. Those small studies wouldn't give you the data that you need to estimate the level of the incidence or prevalence in the general population, but it would give you the data to be able to say that this negative effect occurred.

Q. We will hear more about that from Dr. Walker tomorrow, so I won't take your time with it. Ms. Hollander pointed out that Jordan Riba is a graduate student. Are there any other authors in that study?

A. Yes, there are a number of other authors, including Dr. Callaway.

Q. And where have we heard Dr. Callaway's name before?

[954]

A. Dr. Callaway is the first author and senior author on a number of the papers that I cited in my report and that are relevant to the whole issue of hoasca or ayahuasca.

Q. And he was a co-author on Dr. Grob's article?

A. Yes, he was.

Q. Is he a graduate student?

A. No. He is a senior professor.

Q. You acknowledge that in the Riba study, there was no control group, per se. Were the subjects in that study administered a placebo as part of this study?

A. Yes.

Q. And did the subjects know for each incident whether they were—

MS. HOLLANDER: I am going to object, Your Honor.

Q. (By Ms. Goitein)—getting a placebo?

THE COURT: I'm sorry?

MS. HOLLANDER: I'm sorry, I shouldn't interrupt the question. But I am objecting that this is all leading.

MS. GOITEIN: I don't think it is, Your Honor. I asked whether the subject—[955]

THE COURT: Try it again. I didn't hear the entire question.

Q. (By Ms. Goitein) Did the subjects receive a placebo?

A. Yes, the subjects did receive a placebo.

Q. And is using a placebo a way of achieving a control?

A. That way, the subject acts as his or her own control because you have the capacity to compare the same subject's response to the placebo as to the active drug.

Q. And is that a standard method of achieving a control in this type of study?

A. Yes, it is. The statistical technique used to apply to that is a form of the repeated measures analysis of variance.

Q. Ms. Hollander also mentioned that Riba, et al. did not obtain data on the subjects before the subjects ever used ayahuasca. Does Riba's study purport to measure the long-term effects of ayahuasca?

A. As far as I understood the Riba study, it was designed to measure the acute effects in experienced users.

Q. And did Riba's study provide information * * *.

* * * * *

[959] have been considered risky.

Q. Do you have any anecdotal evidence that 24 peyote users had some kind of psychiatric incident?

A. I have no evidence whatsoever about that.

Q. Do you have any anecdotal evidence that something—that somewhere between five and ten of those were attributed to the peyote—never mind, you just answered that you don't.

Do you have any studies of peyote that have shown that eight people in the test group experienced cardiac irregularities, while only one person in the control group experienced these irregularities?

A. Well, I have no studies that pertain to that issue.

Q. Are you aware of any studies of peyote in which a person had to withdraw from the study because of anxiety?

A. No, I am not.

Q. Are you aware of any study in which one of the ingredients of peyote caused a relapse into a depressive state?

A. No, I am not.

Q. Are you aware of any study in which one of the ingredients of peyote caused a significant * * *.

* * * * *

[963] that, either.

THE COURT: Okay. Ms. Goitein, do you have any questions on that?

MS. GOITEIN: No, sir.

THE COURT: Okay. Ms. Hollander, do you have any further questions?

RECROSS-EXAMINATION

BY MS. HOLLANDER:

Q. You would agree, would you not, that serotonin syndrome is generally a self-limited condition that resolves with discontinuation of the serotonergic medications and supportive care? You would agree with that, wouldn't you?

A. Yes.

Q. Now, Doctor, you went through a whole litany of things that you weren't aware of with peyote of versus anecdotal evidence. But to be fair here, you haven't even looked into it, have you?

A. I can't say that I haven't looked into it at all. There was another context that led me to look at the peyote literature approximately two years ago so that I would be aware if there was a sufficient body of literature that would apply to those issues.

Q. But because there is no body of literature [964] doesn't mean that it has or hasn't happened, does it?

A. That is correct.

Q. Right. That the—in other words, I am not saying that there were events of anxiety or anything else. But you don't know one way or the other, do you?

A. That is correct. And that is one of the reasons why we are doing the research. We want to know.

Q. But you have never done this research up until now, even though upwards of 250,000 people ingest peyote, correct?

A. That is correct.

Q. Would you be more concerned with the use of grapefruit and contraindicated drugs at home than the ritual use of hoasca at a UDV ceremony? You would, wouldn't you?

A. Yes, I would.

Q. And you were asked whether someone would get circumcised 26 times a year. Someone can only die once, correct, as a general rule, as far as we know?

A. As far as I know.

Q. And you are not aware of any fatalities [965] associated with hoasca use within the UDV, are you?

A. No, I am not aware of any.

MS. HOLLANDER: Nothing further, Your Honor.

THE COURT: MS. GOITEIN.

MS. GOITEIN: One question.

THE COURT: Go ahead.

FURTHER REDIRECT EXAMINATION

BY MS. GOITEIN:

Q. You stated that you would be more concerned about a person eating grapefruit juice with a contraindicated medication at home—so we know that risk—than you would a person drinking hoasca in a UDV ceremony. Would your answer be the same if you knew that a person in a UDV ceremony was on SSRIs?

A. No.

Q. Would your answer be the same if you knew that the person in the UDV ceremony had a prior history of psychosis and was still being allowed to drink the tea?

A. No.

MS. GOITEIN: Thank you.

THE COURT: Okay. Ms. Hollander, anything further?

* * * * *

[1003]

Q. I would like you to take a look at Defendants' Exhibit YYY. It says, "Drug Addiction II," on it, but is this an excerpt from the Handbook of Experimental Pharmacology? Excuse me, I didn't hear you. Did you answer?

A. Yes.

Q. This is an excerpt?

A. This is one chapter. There were two volumes. This is Chapter 3 in the second volume.

Q. Now, if you turn to page 321 in this exhibit— page 321 of the exhibit, I think it's the third page, the subchapter, "Criteria for LSD-like Hallucinogens." I am going to read aloud the first paragraph under, "Criteria for LSD-type Hallucinogens." I was going to have you read it, but you talk too fast.

A. I can talk slow.

Q. That is all right. I will read it. "LSD-like hallucinogens produce mood and perceptual changes, disruption of thinking processes, and hallucinations. The mood changes are predominantly euphoric at low doses and dysphoric (anxiety, fear, apprehension) at higher doses. They alter the functioning of the autonomic nervous system. These changes, particularly those associated with low [1004] doses, are characterized by sympathetic stimulation and arousal, but as will be discussed in Subsection D, other types of changes may be produced by these drugs. Finally, these drugs have

marked effects on motor function. Generally, reflex activity is facilitated, but paradoxically ataxia and impairment of motor performance are also seen. These constellations of effects are all agonistic actions of LSD-like hallucinogens and constitute their pharmacologic profile."

Do you agree that those are the primary pharmacologic characteristics that serve to identify LSD-like hallucinogens?

A. Yes.

Q. And are those the characteristics of dimethyltryptamine?

A. Yes.

Q. Are they the characteristics of ayahuasca?

A. To the extent that we have indirect evidence, and the assumption we know that we would classify— most people would classify dimethyltmrptamine as an LSD-like hallucinogen, and from the available knowledge that has been studied, I think there is a consensus of opinion that a major, if not all—a major portion, if not all, of * * *.

* * * * *

[1015]

But it also can be social effects. Because you will have drugs, which the hallucinogens are examples, which don't cause any sort of known tissue toxicity, but their use was causing—was judged as being inappropriate and causing social harm associated with certain sorts of behaviors.

Q. So by harm, you don't just mean medical harm?

A. No, I said medical and social harm.

Q. But there has to be some harm. Otherwise, it's not drug abuse?

A. Well, there is a perceived harm.

Q. Okay. Right.

A. I mean I think it's a perceived harm, to be quite technical. Somewhere along the line, somebody in authority makes the judgment.

Q. And it could be a political decision?

A. Yes.

Q. That it—

A. Partially political.

Q. It could be partially political that this use will cause social harm, correct?

A. Yes.

Q. So you don't necessarily have to have any medical harm, you just have to have a perception on [1016] the part of some authority that it causes social harm, correct?

A. Yes.

Q. And potential for abuse means a substance that has the potential to create public health or social problems, correct?

A. Yes.

Q. Now, you will agree, will you not, that the same subject—I'm sorry—the same substance can be used in one context, can be a drug of abuse in one context, and can be used legitimately in another?

A. Yes.

Q. For example, cocaine has legitimate medical use, does it not?

A. Yes.

Q. And it has legitimate research uses, correct?

A. Yes.

Q. And nobody would disagree that it has—it is a drug of abuse, correct?

A. Correct.

Q. And it has abuse potential, correct?

A. Yes.

Q. Alcohol is not a scheduled drug, correct?

[1017]

A. Correct?

Q. And that was clearly a political decision; do you agree?

A. Yes. Well, in the sense that Congress excluded alcohol and tobacco from the Controlled Substances Act.

Q. But there is no doubt that alcohol is, in, some contexts, a drug of abuse, correct?

A. It's defined as a substance of abuse.

Q. I mean, it can certainly cause social harm, can't it?

A. Yes.

Q. And medical harm?

A. Medical harm, social, harm. It has reinforcing effects.

Q. But is also has legitimate uses, doesn't it?

A. Yes. In a sense, yes.

Q. Well, for example, now—and you might prefer—and I know this is to be true because we have talked about it, but you would probably prefer that nobody ever drank alcohol because you see so many problems with it, is that what gives you pause?

A. Yes. The point I was trying to make in my deposition was that you look at things differently [1018] and my perception is the end—and I see the consequences of substance abuse. I tend to focus on the adverse consequences.

Q. And alcohol is a big one for you; is that correct?

A. Yes.

Q. And to just follow my analogy a little bit further, under most conditions, it would be considered an abuse to provide alcohol to children, wouldn't it?

A. Yes.

Q. But in fact, wouldn't you agree that even giving alcohol to children could be legitimate in some circumstances, for example, in the religious circumstance, correct? Catholic children receive alcohol, don't they?

A. That is an interesting question. You know—

Q. I mean am I correct?

A. —I would suspect that this would not be considered a—

THE COURT: Excuse me. Excuse me just a minute. There may be an objection to the question.

MS. GOITEIN: Your Honor, my objection is that the witness is a pharmacologist, and he is [1019] testifying about the pharmacology. He is not testifying about the social legitimacy of certain drugs of abuse or not. He specifically stated that he was not asked to evaluate whether the UDV's use of the substance is abuse. He was asked to evaluate the pharmacologic potential for people outside the UDV to abuse this drug. These questions are irrelevant and outside the scope of his expertise.

THE COURT: Okay. I am going to permit him to answer anyway. Go ahead.

THE WITNESS: I'm sorry. Could I have the question again?

MS. HOLLANDER: Certainly.

Q. (By Ms. Hollander) You would agree, would you not, that even giving alcohol to children could be legitimate under certain circumstances, for example, in a religious context?

A. I would argue with the word "legitimate," that it's done and it's not of concern, occurs. I can think of a number of circumstances. I was sitting in court when you raised the issue when you have gone to circumcision ceremonies where, you know, they dip the diaper in the wine and they let the baby suck on the wine when they do the circumcision. Whether it's anesthetic or not, I [1020] have no idea. Okay? And I know that an old time remedy for teething was to dip, you know, a diaper in wine and let the baby suck on the wine in terms of this. Whether this is, you know, strictly legitimate or illegitimate, it's done. And whether people would then take a sip of wine in a religious ceremony as an adolescent also would seem to be particularly acceptable within our society.

Q. So to go back to what you said, that drug abuse is partially a political decision, what is social harm and what isn't, correct?

A. Yes. It's also a cultural.

Q. And a cultural decision?

A. Right.

Q. That decision has been made, to some extent, when we consider that we give alcohol to children during a bris or circumcision or during a Communion, when a child—the First Communion, when the child is what, six or seven, correct?

A. I am not sure that the First Communions that I have gone to—I mean I have four kids. The First Communions I have gone to, I don't think they have ever given the kids sips of wine. They have given them the wafer and the host, but I don't think they have ever been given them a sip of wine.

[1021]

Q. But under some circumstances, children under 18 or 21 do get wine in the Catholic Church, don't they?

A. I can't recall having seen it. I have seen going to Mass where you take a sip of wine and I've sipped the wine. But you know, when you ask me this specifically, from my own experience, I don't know. I haven't seen this.

Q. Okay. Now, alcohol is not a controlled substance. Let's talk about a controlled substance. Peyote is a controlled substance, correct?

A. Yes.

Q. Schedule I?

A. Schedule I.

Q. And yet, even Schedule I controlled substance—and DMT is a Schedule I controlled substance, correct?

A. Yes.

Q. And mescaline is a Schedule I controlled substance?

A. Yes.

Q. Even Schedule I controlled substances can have legitimate uses that are not drug abuse, can't they, for example, for research purposes, correct?

A. Yes.

[1022]

Q. Okay. And when Strassman gave people DMT, that wasn't considered—you wouldn't consider that drug abuse, would you?

A. No.

Q. Even though DMT is a Schedule I drug?

A. Correct.

Q. And when peyote is used in the Native American Church, that is not considered drug abuse, is it?

A. Legally, no.

Q. So it's fair to say, then, that the determination of which drugs are drugs of abuse is, as you have said, partially a political decision, correct?

A. Yes.

Q. Partially a legal decision, correct?

A. Yes.

Q. And partially cultural decision?

A. Yes.

Q. And it could also be partially a medical decision, correct?

A. Yes.

Q. Now, the potential for abuse of a drug, you also said, is recognized in two ways, correct?

A. Yes.

* * * * *

[1044] partially relevant, but not completely relevant, so—

Q. Well, are you aware that certain substances have been used for centuries by diverse groups as sacraments to link to the Divine? Are you aware of that?

A. Yes.

Q. Now, you attended the Symposium of the College on the Problems of Drug Abuse this year, did you not?

A. Yes.

Q. And your friend, Dr. Schuster, there was, wasn't he?

A. Yes.

Q. And in fact, he is the president this year, isn't he?

A. He was president one year. I don't know whether it was this year or—

Q. And you certainly consider Dr. Schuster a leading researcher in the area of pharmacologic effects of drugs, don't you?

A. Yes.

Q. And you also know Dr. Herbert Kleber, who was there, don't you?

A. Yes.

* * * * *

[1060]

Q. And the use of peyote in the Native American Church is legal, correct?

A. Yes.

Q. So by definition, then, they are not drugs of abuse when used, ayahuasca in Brazil or hoasca in Brazil and peyote in the United States in the Native American Church, correct?

A. Right.

Q. And the same would be true then if—

A. In a legal sense.

Q. In a legal sense. And the same would be true of hoasca in the UDV in the United States if the Court rules that it can be used as a sacrament, correct? The same would be true?

A. Yes.

Q. Now—

A. Assume—I am not sure what the Court is going to rule. I mean I am not—

Q. This is a hypothetical.

A. I mean, you know —

Q. This is a hypothetical.

A. Okay.

Q. I have one final question for you. Would it make a difference to you in assessing reinforcement to know that the UDV members had no—

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CV-00-1647 JP/RLP

O CENTRO ESPIRITA BENEFICIENTE
UNIAO DO VEGETAL, ET AL., PLAINTIFFS

vs.

JOHN ASHCROFT, ET AL., DEFENDANTS

TRANSCRIPT OF PROCEEDINGS

Motion Hearing
Oct. 30, 2001

BEFORE: THE HONORABLE JAMES A. PARKER
United States District Judge

APPEARANCES

FOR THE PLAINTIFF:
NANCY HOLLANDER
JOHN W. BOYD
FREEDMAN, BOYD, DANIELS,
HOLLANDER, GOLDBERG & CLINE
20 First Plaza, Suite 700
Albuquerque, New Mexico 87102

FOR THE DEFENDANT:
ELIZABETH GOITEIN
VINCENT M. GARVEY
UNITED STATES DEPARTMENT
OF JUSTICE
901 E. Street, N.W.
Room 1032
Washington, D.C. 20004

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[1105] ought to use one that is based on some facts.

Q (By Ms. Goitein) How with about this: Suppose that two people showed bundle branch blocks, four people showed bradycardia, and two people showed ventricular colorization changes, and those are the differences we are talking about. And that is in a test group. And in the control group there was one person, and I am not sure what that person showed. Would this be anything you could find any information from?

A. Well, the reason that I was willing to discount the positive psychometric outcomes was that there is clearly, in the way the groups are put together, there is an adequate explanation, in my view, for a difference between the groups, without any—invoking anything about the tea.

There is nothing that I can think of that was written down in the report about how the groups were put together that would explain differences in—these all, basically, come down to electrocardiographic findings. So, it's something you would want to look at.

The fact that they are all different and not all some common irregularities makes—gives you some reassurance, but this is a sort of thing you would want to follow up on, I would think, [1106] pretty aggressively.

Q. Would you be able, from that, to suspect any correlation with the tea?

A. Well, that would certainly be—

MS. HOLLANDER: I will object, Your Honor. This is calling for speculation. She said, "Would you suspect anything?" That is clearly calling for speculation.

MS. GOITEIN: It's not at all, Your Honor. It's calling for how he would interpret test results, which is what he is here to testify about.

Q. I am asking if you have—given what you have read about the study and how the study was put together, if you found that eight of the people had the irregularities or the changes that I have described to you, would that information be sufficient for you to interpret it as being some kind of correlation with the tea?

THE COURT: I think that question is a little different than the earlier question.

MS. GOITEIN: It's—the only difference is that I used the word interpret instead of suspect. I was using the word suspect colloquially.

Q. My question is, do you have sufficient information to interpret those results as having some [1107] correlation with the tea?

THE WITNESS: Should I answer?

THE COURT: Yes, you may answer.

A. Well, yes. I mean you would certainly want to act on those results in the sense of doing some kind of follow-up investigation to see whether they held up in the larger group. It's very easy to do electrocardiograms on 50 or 100 people, to be straightforward. So you would at least suspect something going on to that level.

And you would also look back to your study design to see if there was some way you had assembled these groups which made your test subjects more likely to have cardiac irregularities. You wouldn't necessarily

take health action as a public health official on the basis of it, but you certainly wouldn't let it lie.

Q. What is the difference?

A. The difference is you wouldn't prescribe use of the tea, for example, but you would quite urgently want to make sure that this was—there was some adequate explanation for this difference in the groups.

Q. Okay. Your report concludes that you can't make any meaningful conclusions about the health effects of hoasca from the study published by Dr. Grob and his [1108] colleagues. Among the 15 people that were studied, can you say that hoasca did not cause any observable neuropsychological damage? Can you say that?

A. Well, you can say that it didn't cause pathological conditions in these people. Damage is relative to what you would have been in the absence of the treatment. So, without knowing what these people would have had as their neuropsychological functioning in the absence of hoasca, you can't make any statement, even in them, about whether there were any effects of the tea or the absence of any effects.

MS. GOITEIN: I will pass the witness.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MS. HOLLANDER:

Q. Good morning, Dr. Walker.

A. Good morning.

Q. Your research is primarily on drugs; isn't that correct?

A. That is correct.

Q. And you haven't written anything on hallucinogens, have you?

A. No, I haven't.

Q. You haven't done any research on psychedelics?

A. No, I haven't.

* * * * *

[1118] talking about for the original studies.

Q. It is still many hundreds of thousands of dollars, isn't it?

A. Typically.

Q. But when we are talking about dietary supplements, those standards, the government doesn't require those kinds of clinical trials, does it?

A. My understanding is that the FDA has been prevented from issuing regulations in those areas by the Congress.

Q. So the answer to my question is that the government doesn't require those kinds of studies, correct?

A. Correct.

Q. And except for imminent hazard, all kinds of dietary supplements show up at the grocery store?

A. That is correct.

Q. And people take them?

A. That is correct.

Q. And just as examples, to make sure you and I are talking about the same thing, things like Ginko Biloba would fit into that; is that correct?

A. Yes.

Q. Things like Broom. Are you familiar with Broom?

[1119]

A. No.

Q. St. John's Wort?

A. Yes.

Q. And I understand you have some issues with that. I am just trying to get at what the state of the law is today; that those trials weren't required for St. John's Wort, were they?

A. That is my understanding.

Q. If we were—if you and I, or all of us were to go to the health food store and look, there would be lots of other substances that came from various plants, wouldn't there?

A. Yes.

Q. Before I forget, I do want to follow up on one thing you said in your direct. It is your belief that stable, long-term church attendance leads to positive psychological characteristics, isn't it?

A. Well, certainly as described in Dr. Grob's reports, that seemed to me that that did, yes. Either leads to or nurtures or encourages. I mean I don't know how far you can go in making that causal statement, but I would have thought so, yes.

Q. Now, assuming—let me ask you this: You don't have any information, based on what you know, to lead you to say that hoasca, when used within the [1120] religious context of the UDV, presents significant con-

cerns regarding its effects on physical and/or mental health, do you?

A. No, not from what I have read. There was, in the Callaway study that I read after writing my report, a description of patients with—not patients. Of members with very low heart rates, and the variability in the heart rate measurements that he reported was really very big. I don't—I mean that is a strong physiological range of responses. I wouldn't characterize that as a health response, though.

Q. If you knew that another study was done, another small study of six individuals who were given ayhuasca in a encapsulated form that had a range starting with the same amount of DMT as was in Dr. Grob's study, and then progressing to double that amount, and with higher beta-carbolines, percentages of beta-carbolines, throughout the study that some of the government witnesses have discussed, and in that study they found no significant electrocardiogram changes, would that be significant?

A. It would—it might be there wasn't even an acceleration of heart rate, but—

Q. They found no significant—

A. That is what they reported, no significant * * *.

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[1123] who weren't regular users of those capsules, since you are just talking about short-term changes in heart rate and things like that, so that they are not comparable at all in terms of long-term effects. But they ought to be comparable in terms of short-term effects, if you are studying the same substance.

Q. (By Ms. Hollander) I am afraid we don't have enough information about either study, so I am going go on, Your Honor. Because I don't know if the premises you are stating are accurate, and we don't have all of that information, so I'm just going to go on. I don't think I have enough information to ask you a question which you can reasonably answer.

A. Okay.

Q. Now, it is your opinion, is it not, that from what you know, there is inadequate data to evaluate the health risks of hoasca, correct?

A. Yes. I think we have to set aside these cardiac irregularities that I just heard about. I just don't have any real information on it.

Q. We don't have enough information. Leaving that aside, because none of us have enough information, that is correct, isn't it?

A. That is correct.

[1124]

MS. GOITEIN: Objection, Your Honor. Dr. Walker doesn't know the information that the rest of us have about the cardiac irregularities. He only knows what he has just been told by me right now.

MS. HOLLANDER: That's what I just said.

MS. GOITEIN: You said none of us have enough information.

MS. HOLLANDER: I'm sorry. I meant that the witness and I—

THE COURT: That is the way I interpreted it, but go ahead.

Q (By Ms. Hollander) You can't say whether a risk exists or whether it doesn't exist, correct?

A. That is really the whole point of my report.

Q. But you can conclude, can you not, that as to the 15-people study, their health status and psychological status at the time of this study was as reported?

A. Yes.

Q. And—

A. We are setting aside these questions sort of hanging around about observer bias and things like that. But taking it at face value, absolutely.

Q. Now, there is much important information regarding drug reactions that comes over the years of its * * *.

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[1135] effects might be on pregnant women?

A. Well, they are never marketed without at least that series of tests. That is absolutely standard.

MS. GOITEIN: No further questions.

THE COURT: Ms. Hollander, do you have any further questions?

MS. HOLLANDER: I have a few, Your Honor.

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MS. HOLLANDER:

Q. The hoasca project was clearly a preliminary study, wasn't it?

A. It was stated that way in the reports.

Q. Throughout the reports, correct?

A. Absolutely.

Q. Now, you were asked some questions about dietary supplements, whether or not they are hallucinogenic. And before I get to that, you would agree with me, wouldn't you, that there are dietary supplements on the market that are not required to have clinical trials, but that can have serious—cause serious harm, health risks, correct?

A. Yes.

Q. By themselves sometimes, correct?

A. Well, I am not an expert in dietary * * *.

* * * * *

[1143] would expect, based upon the way it interacts with these serotonin receptors. So there has been speculation that it does many things in addition to this interaction with serotonin receptors that may set it apart in some respects from the others.

Q. What is the Heffter Institute?

A. The Heffter Institute is a 501(C)—an IRS 501C not-for-profit research institute that I took the lead to found in 1993. The mission of the Heffter Institute is to foster and encourage scientific research of hallucinogens in a medical and scientific context.

Q. Has Heffter ever funded any studies that were also funded by the United States Government?

A. We do have a study that we provided seed funding for, to John Halpern at Harvard, to do a study of peyote use in the Native American Church and look at neurological deficits.

Based on the preliminary data that he obtained in those studies, he then extended that study, received another grant from Heffter, and then a matching grant from the National Institute on Drug Abuse to further expand those studies. That would be the only one I know of.

Q. If you know the answer to this, did—was NIDA interested in doing this study, and went to John Halpern, [1144] or did he go to NIDA, if you know?

A. I believe the initial impetus for it was with John Halpern and his interactions with the Heffter Institute. I think at that time there wasn't much possibility of getting a grant from NIDA, and it was just with the preliminary data he got with our seed money that he was able to get NIDA people interested. That is my understanding.

Q. And that is an ongoing study now; is that correct?

A. That is an ongoing study.

Q. Now, are hallucinogens considered to be physiologically safe molecules or unsafe molecules?

A. From a physiological point of view, they are considered to be very safe in terms of being non-injurious to major organ symptoms, not producing any signs of overt physiological toxicity. There has been no recorded overdose death with any of the hallucinogens.

Q. So I take it you would agree with Dr. Jasinski, in the list that he had, that LSD had not been shown to create any toxicity or harm?

A. I would agree.

Q. And does that include DMT?

A. That includes DMT.

Q. Is there any evidence that you know of that DMT [1145] causes any life-threatening changes in blood pressure?

A. No. The only report I am aware of is the subject that dropped out of Strassman's study who had hypertension to begin with. And one could argue that that response was related to the stress of the high dose. But if you look at the pharmacology of DMT, there aren't serotonin site receptors in the heart and cardiovascular system that would normally produce life-threatening cardiovascular changes.

So in terms of the types of sites they interact with, those are not typically the sites that would produce cardiovascular changes, so you would have to look at changes like that to being secondary to enzymes or something along those lines.

Q. Did you have anything to do with any of Strassman's studies.

A. Yes. Actually, I encouraged him early on to do a study with DMT. He and I had a couple of meetings with the late Daniel Freedman, who was the chair of psychiatry at UCLA, where we planned actually the study. And the way the system worked was, as have you heard from a previous—Dr. Walker, it's very difficult to get a clinically approved drug.

And so, there is no drug company that makes DMT. And I had told Dr. Strassman that when * * *.

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[1182]

Q. Now, so, does the set and setting have something to do with whether—I am trying to not ask this in a leading way, but I am trying to get somewhere. If this portentousness is a reason why people might take these substances, how does that relate to set and setting? In other words, there are certainly people who take LSD or DMT who are not in a religious environment. So how does set and setting interact, or does it, with this portentousness that you are discussing?

A. Well, I think if they produce this quality of portentousness, as Daniel Freedman called it, that would exist in any kind of a context, outside even a religious context for many people, because the experience itself would be attached to a feeling of significance, or high meaning.

So that would occur in the absence of any kind of a religious context. And it would be independent of the mindset. So, that would simply just happen in any case, if that is an inherent property of the drug.

Q. Why do you believe, and you wrote in your report, that it is important that hallucinogens be used only in supervised settings?

A. Well, I am basing that opinion on all the chapters that I have read and all the work over 30 some [1183] years, that set and setting are important. And I do believe that these compounds, because of the profound psychological effects that they can have, should be used in a structured setting with some type of supervision.

Because people can have psychological reactions. Psychosis can be precipitated, and that is particularly true in a recreational setting where there is no structure, there is no context for use of these drugs. And

with set and setting being such a known powerful determinant of the nature of experience, to do it outside of a structured setting in a recreational, unsupervised, unstructured way, I think, is inviting disaster.

Q. When Dr. Jasinski and Isbell, et al., did their studies of LSD, those were in a structured environment; is that correct?

A. I assume they were in a clinical environment, and that is structured in a certain way, but it would not be structured in a way that you would expected to see this kind of meaningfulness that you would see, say, in a religious context.

Q. When Strassman developed his conclusions that there was a low incidence of adverse reaction, was that based on clinical use or unsupervised use?

A. Now, the reports he had access to were * * *.

* * * * *

[1209] degraded by monoamine oxidase.

So, one has to think of that sort of, I think, chemical symphony as producing an effect that might well be different, perhaps only in subtle ways, perhaps not so subtle ways, from the pure DMT itself. There is some evidence recently published from animal models suggesting that maybe the effects of ayhuasca are not simply due to the DMT, and that would be a reasonable conclusion. But I think we can't conclude with certainty because the direct head-to-head comparison hasn't been made between equivalent doses of DMT and the amount of hoasca that would have the same amount.

Q. And did I understand correctly that nobody has done this kind of study with the mescaline in peyote, either?

A. That is correct.

Q. So is mescaline orally active?

A. It is.

Q. So mescaline wouldn't need MAOIs to become orally active?

A. That is correct.

Q. But are you saying that there could be other alkaloids that could contribute to the effect that one [1210] gets from peyote? Is that what you're saying?

A. Certainly. There are a number of chemically related components in peyote, principally isoquinolines, that would be the name, which may have psychoactive effects. They may not necessarily be hallucinogenic, but they may modify the state of the neurochemistry in such a way that they would influence the effect of mescaline. So, unless one actually took peyote and took out the exact amount of mescaline and then did a direct comparison in the same subjects, and used some kind of psychometric assessment and really quantified that, one couldn't be sure.

I have spoken on occasion over the years with people who are members of the Native American Church, and I raised that issue, do you think it's just the same, and of course they always said no, peyote is different. It has a different quality. I think it's a reasonable assumption and it would be different, but I don't know the degree to which it would differ from the pure mescaline.

Q. Have the isoquinolines been studied?

A. Many isoquinolines have been studied, in various contexts.

Q. Is there any published evidence to suggest that DMT possesses any significant physiological toxicity?

* * * * *

[1216] something that you believe is a concern for people who are drinking hoasca?

A. It's an interesting observation. And even in the papers where they discuss it, they talk about how it's fairly unusual

Because of the structure of the beta-carbolines, the chemical structure, it appears that they do interact with DNA. But typically, things which damage DNA, which we would recognize as mutagens and teratogens, actually interact with the chemical strands of DNA and produce damage.

They damage the base pairs, or they damage the backbones, so there is actually a break in the DNA.

And what beta-carbolines seem to do, based on my reading of those reports, is that they may inhibit repair mechanisms, which would ordinarily repair breaks that other compounds would produce. And the significance of that is really not clear. But another thing that you have to realize is that beta-carbolines are components of the many plants and foods that we eat, and in addition, beta-carbolines are produced in the act of cooking foods. They are produced by the carbolysis of tryptophan. So, our body is constantly being [1217] bombarded with these sort of beta-carbolines.

I think if they were mutagenic in any significant way, we—you probably would see something. Again, I think we couldn't conclusively come to that final answer, but certainly there is no evidence from those studies that beta-carbolines have a direct ability to damage DNA.

Q. Is there anything in the scientific literature to suggest that these substances represent a significant toxicological hazard when used within—episodically, as they are in the UDV?

A. In terms of their—or physiological toxicity?

Q. Yes.

A. No.

Q. One of the other issues that has been raised here has to do—well, it's another issue having to do with the MAOIs. And as you know, Dr. Genser spent a considerable period, three long paragraphs of his report, talking about irreversible MAOIs, and in his testimony, I believe, implied that even though there are no irreversible MAOIs in hoasca, that the reversible MAOIs provide some of the same concerns.

So, my question to you is whether you would agree with that? I will start there.

A. I think he indicated that he had a concern, in [1218] view of the fact that things can cause serotonin syndrome, like St. John's Wort, in some individuals. I think certainly one would have to be aware of the possibility that hoasca might produce a serotonin syndrome.

There is a principal difference in—and I think people are just learning to appreciate this. The irreversible MAO inhibitors are actually chemically bound to monoamine oxidase and destroyed, so it could not—

so it could not degrade the monoamines like serotonin and norepinephrine in the body, which could produce adverse physiological effects.

The reversible MAO inhibitors, of which the beta-carbolines are representative, they essentially stick to the active side of the enzyme, if you will. There is an equilibrium, where they would associate and dissociate and associate and dissociate.

And so that if the levels of the endogenous transmitters like serotonin and norepinephrine would increase dramatically, they could actually compete with the beta-carboline and displace it.

So the enzyme is not destroyed. The [1219] enzyme still has the capability to degrade the serotonin or norepinephrine. So the possibility of physiological consequences with the reversible MAO inhibitors is much reduced when compared with the irreversible.

So I think, in very susceptible individuals, maybe it doesn't make much difference what they take; it might still happen. But I think the significance of seeing that, to a large extent, is much lessened by the fact that these are reversible, as opposed to the old-fashioned irreversible type of inhibitors.

Q. When you refer to the old-fashioned irreversible inhibitors, where were those found?

A. They were synthetic molecules.

Q. And were they used as certain drugs?

A. They were used as antidepressants.

Q. Are they still used?

A. Only in rare cases, where someone who is refractory to some of the more benign treatments. There

are some which are still reserved for use that are usually used under close clinical supervision with close attention to dietary restrictions.

Q. And you may have just said this, and perhaps I missed it, but the reversible MAOIs, they bind only for a * * *.

* * * * *

[1227] you?

A. I am not saying they don't produce it, but what I would argue is that they—that is not a reliable effect that always occurs.

Q. Well, you're familiar with the "Handbook on Experimental Pharmacology," aren't you?

A. There are a number of volumes of it. It's not just a single book.

Q. The Volume I am referring to is the Drug Addiction II volume, Volume 45, Drug Addiction II. If you look in your folder there, under Exhibit YYY. Are you familiar with this chapter on the classification of LSD as hallucinogens?

A. I have read it in the past. I have not read it recently.

Q. I would presume you would agree with the statement in there that LSD-like hallucinogens are distinguished by mental changes that are, quote "predominantly euphoric at low doses"?

A. I think euphoria can occur, but I am not sure I would agree that that is a predominant effect.

Q. You are aware that Dr. Strassman's DMT studies showed euphoric responses in the subjects, aren't you?

A. In some subjects.

Q. But you are not aware of any studies of [1228] ayhuasca that have used objective scales to measure its subjective effects, are you?

A. I believe Dr. Grob used the HRS scale, did he not? I am not sure.

Q. Okay. And you're certainly not aware of any other studies that used scales?

A. No.

Q. So you wouldn't be aware that Dr. Riba did two studies with ayhuasca, one with six subjects and one with 75, reporting euphoria as one of its effects, would you?

A. I actually have seen those two studies.

Q. And you are aware that they reported euphoria as one of the effects of ayhuasca, aren't you?

A. Yes.

Q. You're one of the founders of the Heffter Institute, correct?

A. Yes.

Q. The Heffter Institute currently has a research project ongoing that relies on the cooperation of the UDV; isn't that correct?

A. I am not sure I would agree with the way you worded that, "it relies on the cooperation." We fund studies that people present to us that we definitely review, so it's not a sort of study that relies on the cooperation of the UDV. It's a study that we would fund [1229] that they were doing.

Q. Well, Dr. Grob told us that his study on the research of adolescents relies on the cooperation of the UDV. That study is being done through the Heffter Institute, correct?

A. We are funding at least part of it.

Q. And the Heffter Institute has a synergistic and even affectionate relationship with the UDV; isn't that correct?

A. I don't know if that would be a fair characterization. I realize that Dr. Grob and Dr. McKenna both have been involved in what was called the hoasca project, but I wouldn't characterize the relationship with Heffter and UDV as synergistic or—what was the other word?

Q. Affectionate.

A. Affectionate. I wouldn't use that characterization.

Q. And so, if Jeffrey Bronfman used that characterization, he would simply be inaccurate. Would that be your opinion?

A. From my perspective as the president of the Heffter Institute, that would be incorrect.

Q. Now, Jeffrey Bronfman is one of the contributors to the Heffter Institute, isn't he?

[1230]

A. He has contributed.

Q. You have stated that religious thought and theology in human beings started with the ingestion of psychoactive compounds; is that correct?

A. That is an opinion and that I and many other people expressed.

Q. And you personally believe that it would be an injustice if the UDV were not allowed to use hoasca, correct?

A. I believe that's central to their religious practice, and I believe that they should be allowed to continue.

Q. And you believe it would be an injustice if they weren't; is that correct?

A. Correct.

Q. When Ms. Hollander first contacted you about this case you had never done any research on ayhuasca; is that accurate?

A. That is accurate.

Q. And the reason you agreed to testify for the plaintiffs is because of your strong feelings about religious freedom, correct?

A. I would say that is a fair statement.

Q. Because you were pretty upset about the UDV members having their sacrament taken away; is that [1231] accurate?

A. I suppose you could say upset.

Q. And, in fact, you have said upset, haven't you?

A. Yes.

Q. You support the decriminalization of marijuana, don't you?

A. That was a suggestion I made as one thing that would be an improvement in drug current policies, yes.

Q. And in fact, you don't think marijuana should be controlled at all under the Controlled Substances Act, do you?

A. I believe I expressed the opinion that it should be controlled like alcohol and tobacco.

Q. Which are not controlled under the Controlled Substances Act?

A. That's correct.

Q. And you believe that hallucinogens' not only have potential medical value, but have social value as well; is that accurate?

A. I believe they have medical value. The social value remains to be proven, but I think the potential is there I think it depends on how you, you know, define social value. There are a lot of medical contexts that I think these drugs could be used in, where that medical value would be something that would improve social— [1232] would improve the social fabric.

Q. I am on page 62 of your deposition. I asked you the question: "So, aside from potential medical or therapeutic value"—

A. Can you give me a minute to find that? Is it in this book?

Q. It is in that book. It's under deposition.

A. I would just like to read along with you.

Q. Certainly.

A. Okay. Sixty-two.

Q. Sixty-two, line 14. Question: "So aside from potential medical or therapeutic value, is it accurate to

say that you also believe that hallucinogens and psychedelics have social value?

Answer. Yes. I think that they should be used, but again, I don't know how they would be controlled."

That is your position, isn't it?

A. Yes.

Q. And you are not willing to tell the Court here today whether you use hallucinogens, are you?

A. No, I am not.

Q. You have stated that hallucinogens are not known to be toxic to the internal organ systems, correct?

A. Correct.

[1233]

Q. There haven't been any long-term follow-up studies of people who have been using hallucinogens at least twice a month for ten years, have there?

A. Long-term follow-up studies? I am aware of one study that was done with peyote users that looked at many—it was a multi-generational study. I don't remember that they looked at all the physical health assessment, but they did look at—it was a chromosome study.

But I am not aware of any long-term studies that dealt with hallucinogen use.

Q. That is because hallucinogens are not used for those kinds of periods of time, are they?

A. No. They are used typically episodically.

Q. In the Strassman study, there was one individual who experienced cardiovascular problems; isn't that correct?

A. That is true.

Q. I assume you are not aware of any electrocardiographic findings relating to ayhuasca, are you?

A. I am not aware of those.

Q. And as far as any neurological sequellae that might result from hallucinogen use, you would not consider yourself to be qualified as an expert in that [1234] area, would you?

A. No. I am not a neurologist.

Q. But you do know that for a small percentage of people, hallucinogens can precipitate panic reactions, transient paranoid psychosis, and even permanent emotional disorders, correct?

A. That is correct.

Q. And you would agree that these people should not be taking hallucinogens under any circumstances, wouldn't you?

A. That would be my position.

Q. You would also agree that all of the hallucinogens can cause similar psychological reactions, wouldn't you?

A. That is one of the bases for categorizing them as a class, hallucinogens, because there's a general similarity in effect.

Q. And you would agree with Dr. Genser that accidental morbidity or mortality is a risk with any

psychoactive substance that causes hallucinations or altered judgments, wouldn't you?

A. And including alcohol, yes.

Q. Now, trace amounts of dimethyltryptamine may be produced by the human body; is that right?

A. I believe that is correct.

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[1238]

Q. Dr. Brito told us the other day that the concentration of DMT in the bloodstream was 4- to 8,000 times higher in the Strassman DMT studies than in the hoasca project study. That is not accurate, is it?

A. Based on the numbers in those reports, I would say that is incorrect.

Q. And based on the numbers in those reports, that is off by a factor of about a thousand, correct?

A. I would have to do the division, but it's way off.

Q. Now, you don't know if the amount of DMT in the hoasca consumed in Dr. Grob's study is the amount that is always consumed by the UDV, do you?

A. No. I believe it would be variable based on its method of preparation.

Q. And it would also be variable based on the DMT concentration in the plants, correct?

A. That is what I mean by based on method of preparation, because the plants would always—even if you used the same amounts of plant material, there are inherent variations within the plant that would mean you wouldn't have consistency.

Q. And you're presumably aware from reading Dr. Grob's study that the experienced UDV members who constituted the test subjects reported that the * * *.

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[1261]

Q. So they don't compare that subset against, for example, the LSD dysphoric subset, do they?

A. They do report values for the LSD scale in the psychometric assessment paper.

Q. Do they compare those with what—the values that you would get if you looked at an opiate or a stimulant?

A. No. One of the things that was missing when I looked through these papers, that I realized, was I don't know what the values would be for a drug like cocaine or morphine. I don't know what the scale values are, so I think you would need a comparison to really know how these are rated on a scale of relative euphoria with something like morphine or benzedrine.

Q. And they don't provide that in those studies?

A. Not in these papers.

Q. The Government's Exhibit YYY, the Drug Addiction II, are there later editions than that one? What year was that one published?

THE COURT: Well, it shows '77.

MS. HOLLANDER: I was just asking him so I wouldn't be leading, Your Honor.

THE COURT: Well, I was trying to speed it along a little bit.

MS. HOLLANDER: I am happy to.

[1262]

Q. It was published in 1977. Are there later editions, do you know?

A. There are certainly later treatises on amphetamine psychotic drugs, which is an outdated term, and marijuana dependence. They are certainly more up-to-date treatises than this.

Q. Are there more up-to-date treatises on hallucinogens and euphoria?

A. I don't know the extent to which they would treat the concept of euphoria. There are certainly more up-to-date treatises on hallucinogens.

Q. Now, one of the other things you were asked, and this concerns me, because I think this is going to come up later. You were asked about, and you didn't know the answer, whether hallucinogen use was now higher than cocaine use. When you refer to the hallucinogens, you refer to the four classic hallucinogens?

A. That is true.

Q. Do other people sometimes include other drugs as hallucinogens?

A. Yes, and I am fairly strict in my classification. For example, many people would include phencyclidine in classification of hallucinogens. Many people would also include ecstasy, MDMA, in that category. I would not consider those to be in the same [1263] category. In fact, I have done quite a bit of work to show—in fact, the original work on ecstasy, for example.

Q. And ecstasy is methyldioximethamphetamine?

A. 34 methyldioximethamphetamine.

Q. That is what we refer to as MDMA, correct?

A. Ectasy, I did a number of studies, because in the early 80's it was suggested that that drug was actually just another hallucinogenic amphetamine, or another hallucinogen. And I published a series of papers, which were reasonably well accepted, they are certainly accepted in Europe by experts there, that MDMA is not a hallucinogen. It's a different type of psychoactive compound.

So, many people would include phencyclidine, MDMA, and in some cases you might even throw in cannabis, although usually that would be broken out. So there might be things included there that would not be what I consider the classic hallucinogens.

Q. What about MDA? Is that sometimes included?

A. MDA is sometimes included, and in fact, this chapter by Martin and Sloan that you had me look at, which is a bit out of date, but Martin had developed a hypothesis that hallucinogens could be characterized on a [1264] spectrum from LSD-like to amphetamine-like.

Q. And he has got a chart in there, correct?

A. Yeah, but actually that is really—and certainly Bill Martin was an outstanding pharmacologist, and I don't mean to detract from what he did, but this was in 1977. And that really resulted from a failure to understand the pharmacology of MDA. MDA is LSD-like in some sense, but it also has amphetamine-like components.

But for the vast majority of substituted amphetamine hallucinogens, they don't fall in that spectrum. Only MDA, MDMA, they are very proscribed and circumscribed set of compounds, which affect brain dopamine systems, and that is the distinction that he

wasn't aware of. And so, this classification that he developed really is—is sort of obsolete, if you will.

Q. What about Ketamine? Is that considered a hallucinogen?

A. Some people would loosely categorize it as a hallucinogen, but in fact, it has properties similar to phencyclidine, in that it interacts with glutamine sites. And in fact, phencyclidine and Ketamine both can produce addiction and dependence, which distinguishes them from the classical hallucinogens.

But people sometimes will throw them all [1265] into a catch-all category, and you have to be aware of what they are including there.

Q. And finally, what about GHB? Do people ever consider that a hallucinogen?

A. No, I don't think so. I have seen it referred to as a designer drug, but it really falls into the spectrum of sedative hypnotic type drugs, more like the barbiturates or alcohol.

Q. Let me ask you this question: So, when you talk about hallucinogens, you are talking about the four, correct?

A. The drugs that interact with serotonin, 5HT2A sites. They have a common pharmacology, and those are the classical hallucinogens. I try to be a purist, because once things get corrupted and loose in science, you start forgetting what you are talking about sometimes.

Q. And you were also asked about Parkinsonism, and tremor and atonia, and whether that would show up in a small controlled—a small study like Dr. Grob did. My question is, if, in fact, Parkinsonism or tremor

and atonia were showing up in UDV members, do you think these would be noticed by other people in the UDV?

A. I mean I can only relate to what I would do. If I was in the small community of people and I noticed * * *.

* * * * *

[1268] about hallucinogens, for people in a a religious environment that is controlled to the extent that you know the UDV is, from what you know about it, to use hoasca?

MS. GOITEIN: Your Honor I object. We haven't had this witness qualified to talk about the general health and safety effects of hoasca. He has been qualified as a chemist, to talk about the chemical properties of hoasca and I think we are going beyond his expertise. We are certainly going beyond any statement he made in his expert report. He said he doesn't even—he is not an expert on the neurological aspects. We have just gone beyond his expertise.

MS. HOLLANDER: I will ask still another question, Your Honor, since the government is insisting that we not get this in.

Q. Do you believe that it is drug abuse, based on what you know and your definition of drug abuse and the DSM definition of drug abuse, for the members of the UDV to use hoasca in their religious ceremonies?

A. No, I do not.

MS. HOLLANDER: Thank you. I will pass the witness Your Honor.

THE COURT: Ms. Goitein, do you have further questions?

* * * * *

[1285]

MS. GOITEIN: All right, Your Honor. I just wanted to make sure it was on the record.

THE COURT: I think it would be helpful if we could move along to the things that you wanted to really bring out that I haven't read.

Q. Let me ask you this, Dr. Lenderts: Let me ask you some very specific things, and we may go back to this, but since Judge Parker has read your report, I know one of the things that the Court is interested in, perhaps we should just go there, is what you talked about, and what you have consistently talked about, about your challenge of the use of the term hallucination.

And let me ask you, skipping way ahead and assuming that everyone is with us, why do you refer to the effect of the tea as a vision, as opposed to hallucinations, or even if not frank hallucinations, why do you object to that term?

A. Because it's my perception that spiritual information is being conveyed to the participants in the ceremony, in part through the perception of visions.

There is clearly a great controversy, and I think a great deal of confusion related under this term, and I think it can be illustrated perhaps best in the following way: There is a book, which has been mentioned previously in these proceedings, [1286] called "Plants of the Gods," by Richard Schultes and Albert Hoffman. And

in this book, they make reference to the term "sacred hallucinogens."

Now as a physician, I have seen many people having hallucinations. My definition of a hallucination is the perception of something which does not exist in objective reality.

So, if we make the statement "sacred hallucinogens," a hallucinogen being a substance which would cause a hallucination, my feeling is that that term, that expression, is an oxymoron. It's internal inconsistent, because sacred refers to the ultimate reality, the God. Hallucination refers to, or hallucinogen again refers to the creation of unreality. So the term means the unreality creator of the ultimate reality.

Now, I understand—or as I understand, the term hallucinogen became popularized in the common language during the 1960s or so, and a number of things, perhaps starting with LSD, became known as hallucinogens.

The term was adopted and has been applied to a classification of chemicals which have similar properties to LSD.

And I am very aware, as well, that there [1287] is a great deal of debate among scientists, shall we say, or individuals interested in the area of altered psychological states caused by various of these things which have been known as hallucinogens.

And some people want to use the term "psychedelic," some people want to use the term a Antiochene or consciousness altering, but specifically as it applies to the use of this tea in a religious context, it's my clear understanding that what happens is not a hallucination, but is, rather, a vision.

And the term—obviously it has a very different meaning and connotation. A hallucination is caused by a dysfunction of the normal neurological mechanisms in the brain, caused by a number of clinical entities which may include high fever, various drugs, a metabolic disturbance like a hyponutremia or a low blood sodium.

And in contrast with this, the term "vision" has a very different meaning and connotation, so that to call a person a visionary, for example, is a compliment of the high order. So I think in scientific sense, we need to be very careful how we use this term, so that we can define exactly what is going on here, and not create [1288] confusion.

Q. Now, let me ask you to switch topics again, because we are a little bit in a staccato way to try to fill in for the Court. In addition to being a member of the UDV you are also, I assume, a member of DEMEC?

A. Yeah.

Q. By virtue of being a physician; is that true?

A. I am.

Q. And in that regard, what do you understand your role to be?

A. My role is to offer advice, if called upon by the spiritual leader. In this case, in this country of UDV, related to certain medium issues which may present themselves to the organization.

Q. Some of the specific issues that have been raised —one of them involves vomiting, and you have heard Dr. Genser say that someone who vomits—if someone were to vomit twice a month for years that this could cause some tooth problems, or esophageal cancer, or something else. Do you agree with that?

A. No.

Q. Why not?

A. Of the issues that emergency department physicians have to deal with, clearly vomiting is one of the primary, and I have certainly had a good deal of * * *.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CV-00-1647 JP/RLP

Ó CENTRO ESPIRITA BENEFICIENTE UNAIO DO VEGETAL, ET AL., PLAINTIFFS

vs.

JOHN ASHCROFT, ET AL., DEFENDANTS

TRANSCRIPT OF PROCEEDINGS

Motion Hearing
Oct. 31, 2001

BEFORE: THE HONORABLE JAMES A. PARKER
United States District Judge

APPEARANCES

FOR THE PLAINTIFF:

NANCY HOLLANDER
JOHN W. BOYD
FREEDMAN, BOYD, DANIELS,
HOLLANDER, GOLDBERG & CLINE
20 First Plaza, Suite 700
Albuquerque, New Mexico 87102

FOR THE DEFENDANT:

ELIZABETH GOITEIN
VINCENT M. GARVEY
UNITED STATES DEPARTMENT
OF JUSTICE
901 E. Street, N.W.
Room 1032
Washington, D.C. 20004

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[1368] anything further?

MS. HOLLANDER: No, Your Honor.

THE COURT: Okay. Thank you, Dr. Lenderts. You may have a seat.

THE WITNESS: Okay. Thank you.

THE COURT: Who will be the next witness?

MS. GOITEIN: In fact, at this point, Your Honor, could we take a five-minute break?

THE COURT: Sure. In fact, I think at this point we will take about a 15-minute break. We will be in recess.

(A recess was taken.)

THE COURT: Court is in session. Have a seat, please.

MS. HOLLANDER: Your Honor, I neglected to ask Dr. Lenderts a couple of questions and I wonder if I could ask them on recross.

THE COURT: Okay. Dr. Lenderts?

MS. HOLLANDER: Dr. Lenderts, yes.

THE COURT: Okay. That's fine.

FURTHER REDIRECT EXAMINATION

BY MS. HOLLANDER:

Q. Dr. Lenderts, you have been asked questions—Ms. Goitein asked you some questions about when a doctor is in a hospital and they [1369] prescribe medication to someone, they know the dosage, they know exactly what they are giving them. And in light of those questions, I want to ask you whether, as a

physician, you know whether even when doctors give people medicines that have been approved by the FDA, been through clinical trials, been out in practice, know the dose, read the PDR, give the correct dose, in your experience, do you know or are you familiar with any statistics about how many people die as a result of receiving drugs from doctors in hospitals?

A. Yes.

Q. And what do you know about that?

A. Adverse reactions to FDA-approved prescription medications—and this information is available in standard medical textbooks which I read as well as articles which are written about the topic. "Deaths in hospitalized patients in the United States from adverse reactions to FDA-approved prescription medications average approximately 32,000 every year."

Q. And how does that happen if these drugs have already been approved; do you know?

A. We need to understand that even our more revered institutions do not operate in a climate of [1370] perfection. Human error is a part of the human state. In the case specifically of adverse reactions to drugs, any of the drugs that we give, as was discussed earlier in this case, have potential benefits as well as potential risks. The risks in the case of the use of these medications may be something about which quite a lot is known, or there may be what are called idiosyncratic reactions. And an idiosyncratic reaction is something that just happens without really any wherewithal to predict that it could happen. "Consequent to this reality, 32,000 people"—and possibly substantially more —"hospitalized individuals in the United States die

every year from adverse reactions from FDA-approved prescription medications."

Q. Are all of these preventable? In other words, would you say that they are all as a result of doctors not knowing what they are doing, or are doctors relying on what they think is valid information in doing what it appears they should be doing?

A. Some is inadequate information on the part of the physician. Some things are related to information which did not come forth during FDA- [1371] approval because of the size of the test population, as was described yesterday by Dr. Walker, I believe. And some are related to what I described as idiosyncratic reactions which aren't particularly predictable. But we must understand that the giving of medications to human beings in an effort to gain some medical benefit therein carries an element of risk. And at times, the consequences very clearly can be rather substantial.

Q. Are you aware of anyone who has died as a result of drinking hoasca within the UDV?

A. No.

MS. HOLLANDER: That is all I have, Your Honor.

THE COURT: Okay. Ms. Goitein?

FURTHER RECROSS-EXAMINATION

BY MS. GOITEIN:

Q. You said that despite rigorous FDA requirements and clinical testing, that there are 32,000 deaths a year as a result of medications or reactions to medications. I would presume that you would agree that if there were no clinical testing and no FDA require-

ments, that that number would be significantly higher? I assume you would agree with that, wouldn't you?

* * * * *

[1388] this database, do you have any reason to think that the actual level of DMT abuse is higher or may become higher than what is reflected by those numbers?

A. I think it will.

Q. And why do you think that?

A. I think this country is experiencing an increase in all hallucinogenic abuse. That has been the case for the last ten years, as reflected in a number of studies as well as law enforcement databases reflecting seizures.

Q. Could you take a look at Defendants' Exhibit CCCC?

A. Yes.

Q. Can you identify this document?

A. It's a summary of the findings from the 1999 National Household Survey on Drug Abuse.

Q. What is the National Household Survey on Drug Abuse?

A. It's a survey of households, years 12 and older. It's conducted under the auspices of the Department of Health and Human Services, specifically the Substance Abuse and Mental Health Services Administration.

Q. Is this a public report?

[1389]

A. It is.

Q. And is it part of the regular duties of the Substance Abuse and Mental Health Services Administration to publish this report?

A. Yes, it is.

MS. GOITEIN: Your Honor, I would like to move Defendants' Exhibit CCCC into evidence.

THE COURT: Any objection to CCCC?

MS. HOLLANDER: This is just a one-page summary.

MS. GOITEIN: Yes, that is just the summary.

MS. HOLLANDER: Your Honor, I won't have any objection on the condition that we may want to supplement this with more of the findings from the National Household Survey as they become appropriate.

THE COURT: Okay.

Q. (By MS. GOITEIN) According to this chart, how many first-time users of hallucinogens were there in 1990?

A. For the category of all ages, 650,000.

Q. And how many first-time users of hallucinogens were there in 1995?

A. Again, for all ages, 878,000.

[1390]

Q. And how many in 1998?

A. For all ages, 1,245,000.

Q. Do you know what hallucinogens are included in this table when they say "hallucinogens"?

A. I believe I do, yes.

Q. Can you tell me the ones that you know are in there, are included in there, or that you're fairly certain are included in there?

A. I believe that LSD, peyote, mescaline, psilocybin, PCP and ectasy are included.

Q. Is that just SAMHSA's or Substance Abuse and Mental Health Services Administration's classification? Is that just a classification they make?

A. I think that is a recognized grouping of hallucinogenics by DEA, by SAMHSA, by the Food and Drug Administration, by the Health and Human Services Department.

Q. Now I would like you to look at Defendants' Exhibit OOOO, the last one in your book. Can you identify that for me?

A. Yeah. Again, it's the National Household Survey on Drug Abuse, except it's the 2000 summary findings, instead of '99.

[1391]

MS. GOITEIN: Your Honor, I would like to move Defendants' Exhibit OOOO into evidence.

THE COURT: Okay. Any objection to OOOO?

MS. HOLLANDER: No objection, Your Honor. But also we have the full report and may want to add some sections. I assume we can do so without objection.

THE COURT: Okay. 0000 will also be admitted.

Q. (By Ms. Goitein) Now according to this first table that is in front of you, in the year 2000, how many Americans age 12 or older could be estimated to have used a hallucinogen within the past month?

A. Within the past month, 971,000.

Q. And unless there be a claim that only non-classic hallucinogens are being abused, how many of these were LSD, were using LSD?

A. 403,000.

Q. And how many people used LSD in the year 2000 for the whole year?

A. For the past year for LSD, 1,749,000.

Q. And how does that compare to the use of crack cocaine during the same time period?

A. 721,000, so a million less used crack.

* * * * *

[1397]

MS. GOITEIN: Your Honor, it's one of the components of ayahuasca. And in fact, it's marketed as ayahuasca. That is the relevance. This is evidence of marketing of ayahuasca and/or its components, Your Honor.

THE COURT: I will admit it and assign whatever weight it should receive.

Q. (By MS. GOITEIN) As an expert in diversion control, is Internet traffic one of the things that you would rely on to give you a sense of the general demand for a substance?

A. It is one, yes.

Q. It's not the only thing, right?

A. No.

Q. Are you familiar with a Website that is known as the, "Ayahuasca Home Page"?

A. Yes.

Q. Could you look at Exhibit IIII? Have you seen this before?

A. Yes.

Q. And what is this?

A. That's a page from the Ayahuasca Website.

Q. And again, without expressing any opinion on the truth of anything that is contained here, how many posts were made under the Ayahuasca Preparation [1398] Forum?

A. 2,653.

Q. And how many posts were listed under the Ayahuasca Discussion Forum?

A. 3,972.

Q. Now, have you seen any evidence of specific demand for these particular two plants or for ayahuasca made from these particular two plants, psychotria viridis and banisteriopsis caapi?

A. In different places on the Internet, yes.

Q. Is that mostly what you have seen demand for these particular plants?

A. No. Actually, it's ayahuasca and anything and everything. It's not mostly those two plants.

Q. Other than Internet publicity, have you seen any other types of publicity on ayahuasca?

A. Newspapers and magazines, Time magazine, Utnie Reader, the New York Times, Sunday Magazine, again, High Times, Washington Post, San Francisco Chronicle.

Q. If you look at Defendants' Exhibit—well, never mind. Withdrawn. Mr. Woodworth, did you know about ayahuasca before this case?

A. No.

[1403] controls.

Q. Now, you mention in your report—I'm sorry. Does Brazil, to your knowledge, control the manufacture and export of hoasca for religious purposes?

A. I don't believe they do, no.

Q. What about domestically? What are some of the import controls that would be imposed on the importer and distributor of a Schedule I substance?

A. Many of the same controls that I have just mentioned. For Schedule I, it's—since it doesn't have a legitimate medical use, it's viewed with great scrutiny by DEA. There is very little international trade in Schedule I substances. Those are primarily for legitimate scientific research, analytical laboratory needs.

The United States would not import Schedule I substances unless we didn't make them here. So we do import a few, but it's just in real small gram quantities for those purposes.

In the United States, we have a—what we refer to as a closed system of distribution where only authorized and licensed and registered companies, pharmaceutical companies, handle schedule controlled substances. And so before you would be * * *.

* * * * *

[1408] requirements, as well as their inventory requirements.

And so DEA takes the information, then, from the companies and from the Food and Drug Administration and our information and makes a decision on the quotas that we assign, quotas to firms.

Q. Okay. So do you ever just ask the importers how much they need and then just go with that?

A. No.

Q. All right. These controls that you have mentioned, various controls, are they expensive for the government?

A. 800 people in our diversion program spend most of their time in this activity, ensuring that the controls are applied.

Q. Are there any controls that you have mentioned that could not be accomplished at this time with hoasca?

A. Well, there wouldn't be national control at the point of origin in Brazil.

Q. And would that affect any of the other controls that you have talked about?

A. Well, it would affect virtually everything [1409] on the exporting end. But there would be no registration, there would be no quotas, there would be no export documents from Brazil to the U.S.

Q. Now, has DEA had problems ever in the past with diversion from common carriers?

A. Yes.

Q. Because I notice that in the list of controls that you have mentioned, you didn't list any controls over common carriers. If diversion from common carriers is a problem, why doesn't DEA regulate that aspect of the process?

A. Well, common carriers is a problem. It's a weakness, if you will, in our system. There are a number of things that we do do to minimize that risk.

But first I would say that it would not be too practical for DEA to exert the same controls over common carriers that we do over registrants that actually produce or distribute controlled substances because then we would be registering or licensing every ship, every shipping company, every plane, every truck system, bicycle and motorcycle couriers if they delivered substances. So it's not really practical for us to bring the same controls to bear on common carriers. Plus, I think we would * * *.

* * * * *

[1417]

A. Well, that is what an economist would tell you, yes, that it does go against it, yes.

Q. And have you witnessed this actually occurring?

A. Yes.

Q. Let's talk about peyote for a moment. Is peyote subject to the same legal controls by DEA as other Schedule I substances?

A. Generally, yes. There are a few exceptions.

Q. And what are the exceptions?

A. For the peyote distributors, the DEA has registered the suppliers of peyote to the Native American Church. The use of the DEA order form is not required. We don't establish quotas for peyote. And the security at the distributor is—it's not the vault or safe that is required of other Schedule I narcotics.

Q. And why don't you require a vault or a safe with peyote?

A. It's largely not practical. The peyote, as you know, is grown in the Rio Grande Valley in Texas on the side of a mountain, and it's picked and brought to distributors that are registered with DEA, and they put it out on drying tables. If we [1418] were to require them to put the peyote in safes or vaults, I am sure it would affect the peyote.

Q. What would? I'm sorry, I didn't hear you.

A. It would probably ruin the peyote if you locked it in a safe or a vault and didn't dry it properly.

Q. Are peyote distributors licensed by DEA like other Schedule I distributors?

A. Registered, yes.

Q. I'm sorry, registered?

A. Yes.

Q. Do the distributors have to account for each button of peyote that they distribute?

A. Yes, the same accountability that would lead to virtually a perpetual inventory.

Q. And if DEA were to find out about diversion occurring with respect to a particular peyote distributor, could that distributor lose his registration?

A. Yes.

Q. Are there any other controls on peyote distribution besides the ones imposed by DEA?

A. The state of Texas has a number of controls.

Q. Do you know what all of those are?

* * * * *

[1419]

A. I don't know all of them. I know some. They require the distributors to be registered. They require the—what they call harvesters that work for the distributors to have a card issued, I think by the Department of Public Safety in Texas. They require the Native Americans that travel to the distributors to have some kind of proof of their—well, Texas requires that they are 25 percent blood.

Q. 25 percent blood?

A. Proof of not less than 25 percent Native American.

Q. Native American. Okay.

A. Sorry.

Q. That's okay. We just want the record to make sense.

A. And a letter from the President of the Native American Church that the person picking up the peyote is authorized to do so and doing it for legitimate religious ceremonial purposes.

Q. Are there other controls that Texas exercises that you wouldn't know?

A. There could very well be.

Q. Are you aware of peyote being used outside of the Native American Church by non-Indians?

A. Yes.

[1420]

Q. How are you aware of this?

A. All of the same databases that we have discussed previously, and those are DEA STRIDE databases, as well as the State and National Forensic Laboratory Information System. But also DAWN, the Drug Abuse Warning Network, mentions it in their—

Q. How does the STRIDE data for peyote compare to the STRIDE data for DMT, if you remember?

A. As I recall, it's about the same. I am not positive.

Q. Okay. Do you have any knowledge that any of this illegal use is a result of diversion from the Native American Church?

A. No.

Q. Would you say that there is a significant risk of diversion with peyote use?

A. Well, certainly it's a Schedule I substance that has a high potential for abuse, which is a factor in the risk for diversion. So yes.

Q. Okay. Do you think that this risk is less than the risk for diversion of hoasca?

A. Yes and no.

MS. HOLLANDER: Your Honor, I am just going to object, unless there is a foundation laid.

* * * * *

[1422] to assessing diversion control, correct?

A. Correct.

Q. And you have gone through how these factors apply to hoasca, correct? All of that is fine. Do these same factors apply to other substances when you are assessing the risk of diversion?

A. Yes.

Q. Would they apply to peyote?

A. Yes.

Q. And would you be able to apply those factors to peyote to assess the risk of diversion of peyote?

A. Yes.

Q. And would you then be able to make a comparison about the risk of diversion of peyote versus the risk of diversion of hoasca?

A. Yes.

Q. And what would that comparison be, to your mind?

A. Again, yes and no as far as whether peyote risk of diversion was less than hoasca. Yes, in a sense that it would be greater for hoasca since it moves in the international trade through all of these various checkpoints, and therefore, [1423] opportunities for diversion. So in that sense, it would be a greater risk for hoasca. Once hoasca would come into the United States, then the comparison would be about equal. So that is the no part of my answer.

Q. All right.

A. Except that with peyote, DEA has, as I have mentioned in my report, a long-standing relationship with the state of Texas and the Native American Church in preventing diversion and working together for over 30 years. So that is a significant factor, a decrease in the risk of diversion.

Q. And does Texas provide controls at the point of origin, at the point of where the peyote was grown?

A. Yes. Well, there are no controls on the side of a mountain, but Texas provides controls at the distribution point.

Q. And to your knowledge, are there similar controls over the religious manufacture and export of hoasca in Brazil?

A. Not that I know of.

Q. You mentioned a history of working with the Native American Church. Do you have any reason * * *.

[1424] to doubt that you could cooperate with the UDV in the same manner?

A. Yes, some, based on their lack of candor with regard to what has been brought in for the last ten years. They have never contacted DEA. They have never attempted to get registered with DEA. They have never tried to have hoasca exempted from controlled status. And in the seizures, the documentation clearly was either disguised or mislabeled. So there was—there is significant lack of candor. So there is some doubt there.

Q. Do you know whether peyote grows in any countries other than the United States?

A. I believe it grows in Mexico.

Q. So wouldn't you have the same international concerns there?

A. Well, no, because we don't import peyote from Mexico. There is no similar system that we have just described for hoasca.

Q. But would you have to worry about smuggling of peyote from Mexico?

A. Sure.

Q. Would you have to worry about smuggling of hoasca from Brazil?

A. There would be—a concern greater would [1425] be smuggling of ayahuasca.

Q. Okay. But you wouldn't have to worry about smuggling of—about diversion of peyote from Mexico; is that what you're saying?

A. Correct.

Q. Does the United States authorize—well, you were asked at your deposition about the importation—about the exportation of peyote to Canada, and you said that you didn't have any knowledge about that. Have you followed up on that issue?

A. Yes, I did. I came back and checked, and DEA has not issued any export permits for peyote to Canada or anywhere else.

Q. Another topic. Is availability of substitutes a factor in the potential for diversion?

A. Certainly it's a factor. I don't think you can ever find a true substitute. It's going to depend on either factors, the availability and the ingredients in the substitute. But certainly it's a factor.

MS. HOLLANDER: Your Honor, I am just going to object. He says, "You can never find a true substitute." I don't think he has any basis to say that. He is not a chemist. He doesn't know * * *.

* * * * *

[1460] cactus.

Q. And when you were searching on the Internet—

MS. HOLLANDER: Did we move 53F? I am not sure if I moved it, 53F. And if I didn't, I do want to move—that was the last page of your exhibit. I didn't.

THE COURT: No, that has not been admitted yet.

MS. HOLLANDER: No. 53, you don't object to that, do you?

MS. GOITEIN: As evidence of marketing of Phalaris grass?

MS. HOLLANDER: As evidence of what he found on the Internet.

MS. GOITEIN: As long as it's not being entered for the truth of its contents, I have no objection.

MS. HOLLANDER: It's being offered—no. It's only being offered to fill out the exhibit that the government offered.

THE COURT: Okay. 53F is admitted without objection.

Q. (By Ms. Hollander) Now, when you were going on the Internet, you didn't look for examples [1461] of peyote, did you?

A. No.

Q. But would you agree with me that if you typed in "peyote," you would get hits for that, too?

A. Absolutely, yes.

Q. And if you typed in "San Pedro cactus," you would get hits for that?

A. Yes.

Q. You are not going to contest that, right?

A. No, ma'am.

Q. So I don't have to introduce the exhibits to show that those are on the Internet, too, right?

A. Right.

Q. You agree?

A. Yes.

Q. And even though there is Internet traffic about peyote and mescaline, San Pedro cactus, and perhaps other plants that contain mescaline, as you said, peyote has not really been or mescaline and peyote have not really been a major drug problem, have they?

A. Correct.

Q. Now, when you found these sites that you identified earlier as the ayahuasca sites, or if you found the peyote sites, the same question. As far * * *.

* * * * *

[1466] they are at the mercy of anyone figuring that out on the Internet, aren't they?

A. Well, not exactly. In the international trade, if you are monitoring Federal Express or DHL, if you have the control number, you have the ability on the Internet, once that passes Customs, to redirect where its destination may go. So it's more important in the international context.

Domestically, it would be destined from one location to another, Federal Express-wise, and it's doubtful that one would want to change the location, the destination location.

Q. So when you raised that concern, it was for the —it was an international concern? Is that what you were concerned about?

A. Primarily, yes, because that is what the traffickers have done. They have waited until a shipment cleared Customs, and then they go and change the destination, the intended destination.

Q. But now, the cocoa leaf, and I think we have something like over 400,000 kilograms of cocoa leaf come in every year or whatever the statistics are. But it's a huge amount, isn't it?

A. 2- to 400,000.

Q. And that comes in on an airplane, doesn't [1467] it?

A. Actually, I said that in my deposition.

Q. You said it.

A. But I think it comes in on a ship now. That's a huge quantity to be on an airplane, and you were concerned about it being on the same airplane that you were on.

Q. A plane that I was on, right. Well, I was just afraid you guys were going to decide to think it was a smuggler and shoot it down. But it comes in on a ship that might also have furniture or fruit or anything else. It's not a special ship, is it?

A. No, it's not a special ship. It would have other commodities on it.

Q. And the cocoa leaf opium, the poppy straw, those are the two big ones that I am aware of that come in Schedule II, correct?

A. The poppy straw and concentrated poppy straw.

Q. And concentrated poppy straw?

A. There are three narcotic raw materials.

Q. And you would agree with me that, in your estimation, those drugs are—have a high potential for abuse?

A. Absolutely.

[1468]

Q. Okay. And so the fact that they are in Schedule II doesn't make you less concerned about them than if they were in Schedule I, right?

A. Right.

Q. And they come from Turkey, isn't that correct, and we have an obligation to import in from Turkey?

A. We import opium from India, poppy straw from Turkey, concentrated poppy straw from France, Hungary, Australia. And there may be one or two others.

Q. Switzerland, I think?

A. No.

Q. No? And we import cocoa leaf from Peru?

A. Peru and Bolivia.

Q. And Bolivia. Now, Peru and Bolivia, let's just—those are countries where there have also been major problems with illicit drug trafficking; isn't that right?

A. Absolutely.

Q. Major problems?

A. Yes.

Q. And perhaps we would all agree that's not always the world's most stable government, correct?

A. For sure.

[1469]

Q. But the U.S. has worked out a procedure with both Peru and Bolivia for the import of these narcotic substances, correct?

A. We have, yes.

Q. And you have raised this issue that you are not sure that Brazil would corporate, correct?

A. In the sense that it's not controlled. Hoasca is not controlled by Brazil. The cocoa leaf is controlled under the '61 Convention. So Bolivia and Peru were required to control it.

Q. Right. And the same with the poppy straw, correct?

A. Correct.

Q. But the DEA hasn't actually gone to Brazil, sat down and said, "We would like you to work out this program with us," have you?

A. No, we haven't.

Q. And you don't really have any reason to think that they wouldn't be open to that, do you?

A. No, no reason at all.

Q. So once the—in fact, isn't it true that in 1998 the U.S. entered into an agreement with Brazil, and as a condition of that agreement, there was a drug control system established? Are you aware of that? It was for a loan—it was a [1470] condition for a loan to Brazil. Are you aware of that?

A. No, not really.

Q. But you—but the DEA just hasn't made any effort at this point, is that what you're saying, to meet with the Brazilian officials?

A. That is correct. I have no reason to believe that they wouldn't cooperate. We can't require them to do so. We certainly could ask them.

Q. Now, let's talk a little bit about the situation with peyote, which is also a Schedule I drug, right?

A. Correct.

Q. And is also covered by the 1961 Convention, correct, the single convention, peyote?

A. No, peyote is covered under '71.

Q. '71?

A. Correct.

Q. Peyote is covered in '71; mescaline in '75?

A. No. Peyote and mescaline are in the '71 convention. '61 is your narcotics, except for cocoa leaf is also controlled under the '61.

Q. Okay. But they are covered?

A. Yes.

[1471]

Q. Right? Okay.

A. I'm sorry. Peyote is not.

Q. Peyote is not. Mescaline is?

A. Mescaline is.

Q. Mescaline is?

A. Peyote is controlled domestically. It's not under the treaty.

Q. It's not under either treaty?

A. Correct. Sorry.

Q. Okay. Now, you will agree with me, won't you, that peyote is—you said it grows on the side of a mountain. Not just one mountain, is it?

A. No.

Q. A lot of mountains?

A. Mountain range, yes.

Q. It's a whole mountain range full of peyote?

A. Yes.

Q. And there is no control at that point, is there?

A. No.

Q. And no fences?

A. No.

Q. No guards?

A. No.

[1472]

Q. No dogs?

A. No.

Q. No DEA agents?

A. No.

Q. So the control doesn't start until after they call the harvesters or pick the peyote—aren't those the harvesters?

A. Yes.

Q. Okay. And they work for the people who are registered; is that correct?

A. Registered with DEA and the state of Texas as a distributor.

Q. Right. So there is no control until they go out and harvest the peyote, correct?

A. Correct.

Q. And then you said they don't have a vault, and the peyote would probably be unhappy in a little safe. In fact, it's out just laying out in front of what you described as shacks, correct?

A. Correct.

Q. So there is not rigorous control at the point either, is there?

A. No—

Q. And—

A. —with regard to security.

[1473]

Q. With regard to security. That's right. And that is what we are talking about you, isn't it?

A. Yes.

Q. And you agree with me that is what we are talking about?

A. Yes, ma'am.

Q. And you said the distributors account for each peyote button—

A. Yes.

Q. —that they sell. But then the person they transfer it to, they don't account again, do they?

A. Not to the DEA, no.

Q. No. And they don't account again to Texas, either, do they?

A. Not that I am aware of.

Q. Okay. People come from all over the country and they meet the Texas requirements that you described, and the distributor gives them however many buttons of peyote that they want, and then they leave, right?

A. Correct.

Q. And that is the end of the control, isn't it?

A. From DEA's point of view, yes.

[1474]

Q. That's the end of the control from Texas' point of view, too, isn't it?

A. As far as I know.

Q. As far as you know, that is the end of the control, isn't it?

A. Yes.

Q. In fact, Texas has a list of churches on file with it, and if you look at Defendants' Exhibit D, you will see —do you have that one in there?

MS. GOITEIN: I'm sorry, it that D?

MS. HOLLANDER: D.

MS. GOITEIN: I've got it.

MS. HOLLANDER: Do you have it?

MS. GOITEIN: Yes.

Q. (By Ms. Hollander) Do you have it[?]

A. Yes, ma'am.

Q. And that appears to be—and it says—it's dated September 26, 2001. Is that the one you have?

A. Yes.

Q. And it says, "Index and mailing list of churches on file with Texas Department of Public Safety?"

A. Yes.

Q. Okay. And it lists a date that they [1475] evidently have either received correspondence or called them, correct? On the left, it says, "Date of correspondence or call"; do you see that?

A. Yes.

Q. And then it lists the churches?

A. Yes.

Q. Then it lists a place for additional information, and then it lists a place for phone number of contact?

A. Yes.

Q. If you turn to the second page of that—the first page is a list of national organizations, correct?

A. Yes.

Q. And the second page lists Arizona?

A. The second page is California and Canada.

Q. California and then Canada. Okay. Now, there are three of them listed for Canada, aren't there?

A. Yes.

Q. Canada—peyote doesn't grow in Canada, does it?

A. Not that I am aware.

Q. And are you aware that Canada registered to import the use of peyote?

[1476]

A. I wasn't aware of that until you mentioned it at my deposition.

Q. So it certainly appears that churches in Canada also get their peyote from Texas, doesn't it?

A. I hope not. As I said this morning, there has been no export permits that I am aware of.

Q. Okay. But certainly the U.S. has not—assuming that it's true and that, in order to protect people's religious freedom, they have been picking up their peyote from just about the only place you can get it, which is Texas—because you can't get it from Mexico, right?

A. Legally.

Q. Right. I mean peyote is illegal in Mexico, correct?

A. Correct.

Q. For all purposes?

A. Correct.

Q. And so assuming that that is the only place that they could get it and that accommodation has been made, hypothetically the U.S. isn't filling out any kind of export papers, correct?

A. I was not able to find evidence that we had issued export permits.

Q. Now, when you worked out the arrangements [1477] with Peru, the DEA actually went to Peru; isn't that right?

A. I believe we did. I wasn't personally involved. We would have—we probably would have gone down there, as well. We have an office in Lima.

Q. You have an office in Lima?

A. Yes.

Q. You have offices in Brasilia also, don't you?

A. We do.

Q. And that is the capital of Brazil?

A. It is.

Q. Okay. We're finished with that, if you want to—I don't want you to have to sit there with all those books.

You actually—I think you told me at your deposition that you—early on in your career with the DEA, that you actually worked with the Texas Department of Public Safety to help set up some of these anti-diversion control measures with the Native American Church, correct?

A. I don't know that I helped set up the control mechanisms. I was stationed in Texas for five years, and part of my duties there were to [1478] investigate all registered handlers, exporters, importers, manufacturers, distributors. And peyote distributors were a part of my job, and did I participate in those investigations and did interact with the Texas Department of Public Safety in that regard.

Q. And you're aware of the fact, aren't you, that people in Native American Church often refer to peyote as medicine?

A. Yes.

Q. And even though they refer to it as medicine, that it's a sacrament, don't you?

A. Yes.

Q. And in fact, you also know, don't you, that before the exemption which went into effect, I believe in the mid-'60s, some people actually got arrested for trying to get their peyote for their religious practices in the Native American Church, correct?

A. I believe that's true.

Q. In the early years?

A. Yes.

Q. And they had to kind of sneak around to get it to avoid the law; isn't that right?

MS. GOITEIN: Objection, Your Honor. This [1479] calls for speculation on Mr. Woodworth's part as to what the Native Americans were doing.

THE COURT: If he has personal knowledge of it, he can answer it.

A. I don't have personal knowledge. That was before my time.

Q. (By Ms. Hollander) But you know that if the authorities found out, people would get arrested? You do know that, because you just said that.

A. Yes.

Q. I would like to ask you to look at Plaintiffs' Exhibit No. 31A.

MS. HOLLANDER: I believe this is in evidence, isn't it?

MS. GOITEIN: Yes.

MS. HOLLANDER: I just have a couple of questions. May I just show it to him and ask him my questions here, Your Honor?

THE COURT: Sure.

Q. (By Ms. Hollander) Have you seen that document before?

A. No, I don't believe so. Although last night I was flipping through a bunch of documents and I did see, "Varig," but I didn't read that [1480] document. I mean I know that's the Brazilian airline, but I didn't—so no, I have not seen this.

Q. Okay. Well, looking at that document, that is one of the shipping documents that the UDV used over the course of—I believe that was in 1995; is that correct?

A. Yes, yes. It says, "July."

Q. July of 1995. And it says hoasca on it, doesn't it?

A. It does.

Q. And it also refers to it as medicinal tea, doesn't it?

A. It does.

Q. And if you open that to the next page, there are some instructions to, I believe, the shipping broker, correct?

A. Yes.

Q. And it refers to—it's there as, "Chacrona and Mariri." In the middle, do you see that?

A. Yes.

Q. Are you aware of the fact that psychotria viridis has been known as Chacrona for many, many years?

[1481]

A. Yes.

Q. So that pretty much identifies what it is, doesn't it?

A. In terms that are different than some of the more popular ones used, but yes.

Q. But terms that you know, correct?

A. Yes.

Q. Now, I would also like to ask you to take a look at Plaintiffs' Exhibit 67, which I am going to give you when I find it. Let me just take that back just so I don't lose it and exchange it for this. Thank you.

MS. HOLLANDER: Your Honor, I would like to introduce Plaintiffs' Exhibit 67 as an admission of a party opponent, and then I would like to ask him some questions about it. The government has a copy. You have a copy, don't you? Do you have a copy?

MS. GOITEIN: Yes, I do.

MS. HOLLANDER: This is a letter to a Mr. Watts, December 2, 1998, from Donnie R. Marshall, Acting Deputy Administrator of the DEA.

THE COURT: Are you offering it into evidence?

MS. HOLLANDER: Yes, Your Honor.

[1482]

THE COURT: What is your position?

MS. GOITEIN: No objection, Your Honor.

THE COURT: Okay. It's admitted without objection.

MS. HOLLANDER: And I would just like to call attention to Your Honor that we previously admitted Plaintiffs' 57, which is another letter from Donnie Marshall dated March 28, 2001. It's the same Donnie Marshall.

Q. (By Ms. Hollander) Who is Donnie Marshall?

A. He is retired. He used to be the DEA administrator prior to Administrator Hutchison. And before that, he was the deputy administrator, and before that he was in an acting capacity as the acting deputy administrator, which is how he signed this.

Q. That is when he signed this letter, right? And he has been there during the time that you worked there, correct?

A. Yes, ma'am.

MS. HOLLANDER: Your Honor, could I just have a minute? I just lost a piece of paper.

THE COURT: Sure.

MS. HOLLANDER: I'm just trying to figure out what I did with it. Your Honor, that's all [1483] right. I'll go on without it.

Q. (By Ms. Hollander) And so the position he held in 1998 was acting—

A. Acting deputy administrator.

Q. And he certainly had authority to write this letter that he wrote, didn't he?

A. He did.

Q. Are you familiar with this letter?

A. Not intimately. I know of its existence. I had no participation in this.

Q. In this letter?

A. No.

Q. But you understand what this was about, don't you, that this was in response to someone who wanted to basically fashion the exemption that the Native American Church has for marijuana, correct? "Adoption of the following"—do you see on the first page where it says, "The listing of marijuana"—this whoever Eddie Watts is has kind of refashioned your exemption to say, "The listing of marijuana as a controlled substance does not apply to non-drug use of marijuana." Do you see that?

A. Yes.

Q. So they just put "marijuana" in where it [1484] said "peyote," essentially, right?

A. Yes.

Q. And it's the position of the DEA, is it not, that the DEA responds by saying that they are going to deny this, correct?

A. He has submitted a petition and that the acting deputy administrator is denying the petition, yes.

Q. And in denying the petition, you would agree, would you not, that the DEA says—and I am on the second page here, in the second full paragraph, that part of the problem is—and it says, "Assuming without deciding that the Nation of The Living God is a bona fide religion, the application of marijuana laws constitutes a substantial burden. I find that the granting of the exemption is not warranted." And they talk about the problem of the enormous amount of marijuana abuse in this country, correct?

A. Yes, there and also on page 3.

Q. On page 3, right? And they say that in 1997 alone, federal agencies seized 1,520,000 pounds of marijuana?

A. Yes.

Q. And that, therefore, it says, "Given the [1485] large amounts of marijuana available in the United States, it would be extremely difficult, if not impossible, for the DEA to attempt to monitor compliance"?

A. Correct.

MS. GOITEIN: Your Honor—

THE COURT: Yes.

MS. GOITEIN: —in the interest of completeness under Rule 106, I think it should also be listed that another of the reasons that the exemption is denied. On the bottom of that same page it is stated, "Marijuana is certainly not considered as a deity on its own, but it's used as an aid in achieving spiritual enrichment and edification," and that is listed as one of the differences that compels that finding that the members of the two churches are not similarly situated.

MS. HOLLANDER: Well, I suppose the Court can read the letter. I would just like to point out that the letter also says, in the last paragraph on page 3, that a meaningful distinction exists between the use of peyote in religious practices and the use of marijuana as proposed by this organization. In the Native American Church, the use of peyote is [1486] limited to specific ritualized ceremonial occasions. Peyote is worshiped as a deity and it is essential to the existence of their religion.

"In contrast, members of the Nation of The Living God use marijuana every day, with the ceremony on the seventh day lasting from sunrise to bedtime. Marijuana is apparently not considered a deity as its own. It is used as an aid in achieving spiritual enrichment and edification." But is clear that the whole paragraph should be plus the amount of marijuana in the trafficking.

Q. (By Ms. Hollander) Now, the point is: You would agree, would you not, that even though peyote is used in the Native American Church and has been used for —through exemption now, for almost, what, 40 years, 35 years, longer than that?

A. Yes.

Q. You really haven't had a problem with diversion? You haven't had a problem with diversion from the church, have you?

A. No, we are not aware of one.

Q. And you really haven't had a big problem with peyote in general, correct?

A. It just depends on how you define "big problem." There certainly have been seizures of [1487] peyote and mescaline, as reflected in the various databases.

Q. But they are very small quantities, aren't they?

A. Relative to marijuana and cocaine, yes, but still they are controlled substances that are Schedule I.

Q. And relative to MDMA—

A. Yes.

Q. —they are small?

A. Yes.

Q. And relative to—what did you say? And relative to heroin, they are small?

A. Yes.

Q. And relative to methamphetamine, they are small?

A. Yes.

Q. And relative to all of the major drugs of abuse, they are really quite small, aren't they? You have to admit that, don't you?

A. Sure. Yes.

Q. You said that there is a long history of cooperation with the Native American Church. Who is the Native American Church? What I am getting at is who do you work within in the NAC?

[1488]

A. Not having done so personally, I don't know the names of some of the individuals. But my predecessors did, in fact, meet with several different individuals associated with the Native American Church, and I can retrieve those names, but I don't remember what they were.

Q. You will agree that, just looking at the list of Defendants' Exhibit D, there is a large number of different churches, aren't there?

A. Yes.

MS. HOLLANDER: Can I have a minute to consult with counsel to see if they have anything else?

THE COURT: Yes.

MS. HOLLANDER: Thank you, sir. I have no further questions.

THE COURT: Okay. Ms. Goitein.

REDIRECT EXAMINATION

BY MS. GOITEIN:

Q. Ms. Hollander asked about whether enforcement actions were taken with respect to the E-bay ad. And I know you have said that you don't know whether any enforcement action was taken with the E-bay ad. But is there any—let's assume that there wasn't any taken, and you said you didn't know [1489] of any. Is there any reason why DEA would not—well, would take enforcement action when you discover a shipment of ayahuasca and would not when you see an E-bay ad for a psychotria viridis plant on the Internet?

A. Yes, several reasons. The E-bay ad, we don't know about the accuracy or the truthfulness of it. We don't know where the site is. There's a lot of Internet sites that are located outside of the United States.

Additionally, the advertisements that we talked about here for E-bay were for a single plant, a phychotria viridis and banisteriopsis caapi, where the hoasca or ayahuasca coming in were much larger quantities and clearly intended for human consumption. So those would all be factors that we would consider in whether enforcement action would be pursued in one area and not in another.

Q. I know the answer to this question, but I would like to ask it anyway. Does DEA take enforcement action on every lead and every tip it ever gets?

A. No. It would be impossible to do that.

Q. What about Ms. Hollander sitting over there with a San Pedro cactus? Why aren't you [1490] pulling our your cell phone and calling local law enforcement?

A. Many of the same reasons. It's a single plant. I have no evidence other than her statement that it contains mescaline, if we are talking about the cactus and DMT, if we are talking about the Phalaris grass. So again, a single plant. Certainly if she or the nursery where she obtained these, or her assistant obtained these, was identified by DEA as a distribution point for large quantities of these materials that were then being broken down for human consumption, DEA would be remiss if we didn't do something about that.

Q. Now, Ms. Hollander asked you about whether or not you had asked Brazil about whether or not they would control hoasca. And she talked to you a little bit about working with Peru and Bolivia. Now, I don't want to talk about—well, maybe I should establish—did those countries already control cocoa leaf under their law at the point that DEA worked with them to implement a system?

A. They did, yes.

Q. Okay. In terms of countries like Brazil that, under their law do not control a particular substance, has the United States Government ever [1491] asked a country to bring a substance under control that that country didn't control, to your knowledge?

A. Yes. Actually, we have a number of times over the years.

Q. And what has happened when that has been done?

A. Generally, the country has not placed it under control. If we are able to go visit them and show that we have a significant diversion or abuse problem in the United States, they might take some extra precautions in conjunction with their industry on a voluntary basis. But they simply haven't placed it under control because the United States has a problem with that particular substance. It has happened with numerous drugs over the years.

The Caapi we just talked about this morning is not controlled anywhere else. We have gone to Germany and China, where we import it from, and asked them if they would control it. They have not been willing to do so, but they have agreed to work with the companies that produce those substances and try and arrange a more secure shipment to the United States.

Q. Now, Ms. Hollander asked you at some point about where the controls started with respect to [1492] peyote. And I believe she asked you if the controls didn't start until after the harvested—harvesters harvested the peyote. And I think you—the two of you may have been talking about cross-purposes with respect to the word "control." Are there any controls over the harvesters prior to them—I mean—

A. Yes.

Q. —are there any controls implemented with respect to the harvesters prior to the point they actually go out and start picking the plants?

A. Yes. The distributor is registered by DEA first, and then it's registered by the state of Texas, secondarily. Then the state of Texas requires the harvester to be identified by that distributor and carry a special identification card. So that when they are up in the

mountain range picking the peyote buttons and the Department of Public Safety would encounter them, then they can prove that they are, in fact, a harvester.

Q. It came up whether or not you knew whether Native Americans refer to peyote as a medicine. Do you know—and if you don't know, that's fine. Just tell me. But do you know whether Native Americans traditionally use peyote and claim to use [1493] peyote as a natural medicine?

A. No, I don't know that.

Q. The Portuguese words "Mariri" and "Chacrona," did you know these words prior to this case, this litigation?

A. No.

Q. I presume you can't—well, maybe you can. Do you know if those words are on any DEA lists of substances? I am sorry. Let me try the question again.

"The shipping document that Ms. Hollander showed you that lists the term "hoasca"—and I will show it to you right now. That is Plaintiffs' Exhibit 31A?

A. Yes.

Q. That first page where it says, "hoasca," what kind of shipping document is that?

A. It's a Shipper's Letter of Instructions for an airway bill.

Q. Okay. And is that an export document or an import document?

A. Well, it would be neither. It's just an airway bill for the airlines.

Q. I guess my question is: Can you tell by looking at it whether it was filled out on the * * *.

* * * * *

[1512]

MR. BOYD: I will get to that, Your Honor. I will.

Q. (By Mr. Boyd) And what did they teach you?

A. I have been told by my father and my grandfather and other elders that when this Native American Church became a church on October 11, 1918, when it became a church, it open the doors to whomever that wanted to come in and worship with us or to come in and sit with us in our church. We would either pray with them, worship with us, or come in and to look on and to make sure that we invite them also and also that they would not be discriminated against and the door would be open to them.

Q. Did you see that your father and grandfather practiced that in their activities?

A. Yes, I have seen my father and my grandfather practice this. And I have seen other elders when I have attended services. They have invited non-natives to come into their teepee, what we call a church, and ask them to sit down and respect what they are doing, and they followed suit.

Q. And have you practiced the religion that way as a roadman?

A. Yes, I have.

* * * * *

[1517] lot of them are there to visit, you know, because we have never seen each other for a while, you know, especially when we travel so much.

Q. All right. And are there many occasions in which the group inside the tent or the group outside the tent that is socializing includes both native and non-native people?

A. Yes.

Q. With respect to the peyote itself, how does it arrive at the ceremony?

A. Presently or in the past or, you know—

Q. Well, how is it done now?

A. We have a certain time of the year in February that we go down on what we call a pilgrimage to the peyote gardens and harvest or buy peyote from dealers that are in Texas.

Q. Uh-huh.

A. We had a ceremony down there at this one old lady's place in Mirando City. Her name is Amada Cardenas.

Q. Is she an Indian woman?

A. She is Hispanic. But she has been—her family has been dealers for years and years. She is 96 today, so her husband is gone. She has one boy. She has some grandchildren. But we have—she has [1518] invited Native Americans, non-natives to her place there to have a ceremony Fridays and Saturday nights. In the recent years, there has been a hogan that was erected or built down there on her property for those that go down there and they use that as a church also. But when we are down there, we set up a teepee and we

have those—Friday and Saturday night, we have a teepee meeting. I conduct the Friday night meeting, and another person conducts the Saturday night meeting.

Sunday, we have a feast, and everybody visits for maybe three, four days on her place down there to visit with her. Monday, Tuesday, everybody starts to leave home.

Q. And you leave and you take some peyote back with you?

A. We bring some peyote back.

Q. All right. And is it just in a sack or—

A. Some of it that we purchase is dried already, dried by the dealers. Some of them are—is still green and they are sacked and we bring them back. When we get home, we take care of it by preparing it, by drying them ourselves.

Q. And how much peyote gets used at a typical ceremony? I know there are different numbers of [1519] people there, but can you give the Court an estimate?

A. Usually less than 500, maybe 300. You know, it depends upon how much—how much a person has powder, in powder form, how much a person has in what we call tea stock, you know, the roots of the tea, peyote. Those are generally what we use. It depends. Maybe we use 2-, 300. You know, we use 2-, 300 per meeting.

Q. Okay. And do different people at the meeting take different amounts of peyote?

A. Yes. It's up to them however much that they want to take. You know, nobody tells them that you

have to take four spoonfuls or anything like that. It's just how much that they feel that they can take.

Q. Okay. So it's up to the individuals?

A. It's up to the individuals.

Q. All right. Now, after you—when you have purchased these peyote buttons at the gardens in Texas, are there any papers you have to fill out?

A. Yeah, we fill out papers. We have authorization papers from the Native American Church that was getting out of the state of Texas, a charter that we have in the state of Texas.

[1520]

Q. Uh-huh.

A. And also we have authorization papers from our own communities. Like from my church, we have our cards that we carry.

Q. You mentioned the Native American Church of the United States, and we will talk about this more a little bit later. But is that some sort of an umbrella organization for various groups?

A. That is an organization that is in Texas today that was started back in the 19—around 1945.

Q. And did it change its name back and forth at some point in its history?

A It became the Native American Church of the State of Texas at one time, but it has been changed to the original name of the Native American Church of the United States.

Q. Was it ever called the Native American Church of North America?

A. No, it wasn't.

Q. After you leave, after you leave the peyote gardens in Texas, are there any more forms that you have to fill out or reporting that you have to make to the government?

A. Those of us that are authorized to issue [1521] these authorization papers have to send those papers into Austin.

Q. That is for Texas, the state of Texas?

A. That is in Austin, Texas, yes, to the Department of Public Safety there. There is a form that the dealers have that they fill out, that they send to DPS also. And we have authorization papers from the state of Texas. I am one of the vice-presidents in the state of Texas. So through one of our lawyers down there, we have given —he gives us a packet of authorization papers that we keep with us so that whoever doesn't have authorization papers from his reservation or from his homeland, if he is a Native American, we fill that out to follow the laws of Texas.

If it's a Native American, we fill that out that we are a Native American group. And then they are free to travel. You know, they have the authorization to take peyote back to their reservations or their homes.

Q. Okay. After you leave there or after you leave the state of Texas with however much peyote you have, are there any reporting requirements?

A. Not that I know of. I have never had to report anything else when we got back home, you [1522] know, because I buy peyote for my organization. You know, other family members buy peyote for themselves, you

know, that they keep. In case that they have services, then they can use their peyote.

The peyote that I buy is for the church in case anybody doesn't have any peyote and they need to use some of that, that we furnish that peyote for them.

Q. If, for example, you were to lose some, let's say, you know, a mouse got to them or something, or the house burned down or whatever, would you be required to report that to the government?

A. No.

Q. At your meetings, is there any requirement that doctors be present?

A. No.

Q. Do you feel you ought to have doctors present at your meetings?

A. No, because we feel that the sacrament of peyote is our doctor also.

Q. Have you ever found—have you ever observed anyone be hurt in any way by the consumption of peyote such that they would need a doctor?

[1523]

A. No.

Q. If someone becomes—well, strike that—do people often throw up during meetings?

A. Yes, they do.

MR. SZUBIN: Object to this line of questioning, Your Honor. Mr. Naranjo wasn't offered, and his declaration on what he would testify about was about his own church and the ethnic composition, not about the health and safety of peyote.

MR. BOYD: I think he is just a fact witness, Your Honor. I am not asking him for expert opinions. I am just asking him what he has observed and what his feelings are about his church.

THE COURT: He can testify about his observations during the ceremony.

Q. (By Mr. Boyd) Are you required to keep track of how much peyote people ingest at a particular meeting?

A. No, we are not.

MR. SZUBIN: Objection. What is the foundation for Mr. Naranjo knowing the answer to that? I also object that it's vague. Required by whom?

MR. BOYD: By anyone.

[1524]

Q. (By Mr. Boyd) Do you know or are you aware of any legal requirement that you keep track of how much peyote is ingested by the individuals present at your meetings?

A. No.

Q. Are you aware of any legal requirement that you must keep your peyote in a safe with an alarm?

A. No.

Q. To your knowledge, has—well, strike that. Is peyote often referred to as medicine?

A. Yes, it is.

Q. And do you consider that it is a medicine in addition to being a sacrament?

A. Yes.

Q. And why do you think that?

A. It's the teachings of our elders, and also the teachings of our elders is that this herb was given to us by the Creator to use for medicinal purposes and also to be used as an herb that will put us closer to the Creator and give us a clearer mind. Also that—you know, this is, I guess, not in the same context, but almost like taking aspirins, you know. So it's our medicine. You know, the members of the church, it's our medicine [1525] that we use. And we feel that—and the faith that we have in this herb is that it will help us in our life. It will help us physically, mentally and spiritually.

Q. And has that been true for you in your life?

A. In my life, it has been.

Q. And has it been true in the lives of your family members, from your observation?

A. Yes.

Q. And has it been true for the lives of the people in your church group?

A. Yes, it has.

Q. Both Native Americans and non-Native Americans?

A. Both Native Americans and non-natives.

Q. Now, who decides—strike that. Do you have any sort of screening process before people are allowed to come into a meeting? I mean how is it decided that people get to come into a meeting?

A. One is through invitation. One is that a family member, another person, is either a native or a non-native and wants to—you know, they want to come and go into the church services. You know, we sit down and

ask him, you know, what his intentions [1526] are. We ask him why he wants to come in there.

If his intention is good, if he intends to be respectable and follow the ceremony protocol, then we will let him in. But if he comes there just thinking that it's a place to come and have a party or get high or whatever he thinks, you know, just the negative part of it, then we tell him that we appreciate him coming, but at this particular time that we won't let him come in. So we do that screening there before we go in. But we will ask him to stay around if he wants to. But you know, a lot of times they will leave and go home.

Q. And people in that latter category, are those both Native Americans and non-Native Americans, in your experience?

A. Yes, yes.

Q. On a typical meeting that—I am not sure there is such a thing as a typical meeting. But in most meetings, who is it that generally gathers the group together that is going to attend the meeting?

A. Whom we call the sponsor. It could be a young man, a young lady. It could be somebody that is graduating. It could be elders or it could be a couple or a family. These are the ones that, you know, call these people together, all the people, [1527] the roadman, the drum chief, the cedar man, the water woman, the fireman, and all the members of the church. And they also send out invitations, maybe by word of mouth or by calling up or send out invitations by mail of who they want to be there. So generally it's the sponsors that call the people together.

Q. Do you have an estimate from the number of meetings that you have either attended or led of how

many of these local Native American church organizations in the Southwest, just in this general area, Texas, New Mexico, Arizona, Colorado, Utah, on what percentage of occasions do you believe you have attended ceremonies where non-Native Americans have been present?

A. I would probably say, through all these years, probably 60 percent.

Q. Sixty?

A. Sixty percent.

Q. And is it your—has it been your impression in attending those meetings that those non-natives were accepted by the local community that had organized that meeting?

MR. SZUBIN: Objection, calls for speculation.

* * * * *

[1534] call him my brother-in-law, not by blood or anything like that. His wife was taken or adopted by my mother as a daughter in the Native American Church. Not adopted by signing papers or anything like that, but by adoption of the Native American way, by adopting somebody into your family. So she was adopted by my mother as being one of the daughters. So she was—she is married to this non-native, and she became my sister.

So the man that she is married to became my brother-in-law, and his name is Ben Eagle. And you know, I have known him to conduct Native American Church services. There are others that I know also.

Q. And do Native Americans who want to hold a Native American church ceremony sometimes call

these non-native roadmen to come and conduct a ceremony?

A. Yes, they do.

Q. And why would they—

MR. SZUBIN: Objection, Your Honor, lack of personal knowledge.

Q. (By Mr. Boyd) Have you seen him conduct a ceremony?

A. Yes, I have.

Q. And how else would he have been there [1535] unless he had been invited?

A. He was invited by the family to come down here. This has happened on the Navajo Reservation. It happened on his place up there. You know, I have taken care of a fire for him, you know, by staying there. But he conducts the services. I take care of fire. He has his own drummers, you know, cedar men. He calls me up and says, "Brother-in-law, come down and take care of cedar for me or take care of fire for me," and I have done that.

Q. And why do you think that an Indian family would call a non-native roadman to come and conduct a ceremony for them on the Navajo Reservation or anywhere else?

MR. SZUBIN: That calls for speculation, Your Honor.

THE COURT: Unless he has personal knowledge, it would be speculation, I guess.

Q. (By Mr. Boyd) Well, do you know what this man's reputation is?

A. Yes, I do.

Q. All right. And what is his reputation as a roadman?

A. As a roadman, for a lot of the Native Americans, it's respect. It's the respect of who he [1536] is, of how he conducts himself, how he conducts his services, how he makes prayers. Just by being who he is, he has gained that respect.

There isn't anybody else that—you know, they would call on to say, "Well, you know come down and take care of my meeting for me," or, "Run a meeting for us." They have watched him over the years, and they have learned from him and talked to him and asked him certain things about what he knows about the Native American Church ceremonies. And they feel that they can trust him and respect him and feel that—and feel confident that he will be able to make a good prayer for them for the night that they have selected. And he has done that. And I have been there, you know. And there are others that I have seen. You know, but there again, there are others that I know that have not done such a great job.

Q. Now, have you studied the history of the Native American Church?

A. Yes, I have.

Q. Do you—have there been African-American native roadmen—I mean African-American roadmen in the Native American Church?

A. Yes, there have been.

[1537]

MS. SZUBIN: Objection, Your Honor. I don't think the simple question: Have you studied the history of the Native American Church is sufficient to qualify Mr. Naranjo as an expert on the history of the Native American Church.

MR. BOYD: I don't think this is a matter of great controversy, Your Honor. It's in every book. It's over on the table. As the government well knows, it's a historical fact. I am getting it out this way, rather than going to the trouble of getting a book of one of the experts. But I am not going to try to offer Mr. Naranjo as an expert in Native American history. I don't think it's a matter of controversy, but—

THE COURT: Well, is he personally acquainted with any African American roadmen?

Q. (By Mr. Boyd) Are you?

A. Yes.

Q. And who is that?

A. His name is—man, I can't think—there used to be—

Q. Well, if you think of it, let us know.

A. Okay.

Q. Mr. Naranjo, do pregnant women participate in the Native American Church?

[1538]

A. Yes, they do.

Q. And has that always been the case, as far as you know?

A. If they choose to come in, they are like anyone else. Like I said, you know, nobody is barred.

Q. Okay. Is that a source of concern to you, that a pregnant woman would be taking peyote at a ceremony you conduct?

A. No, it never has been.

Q. And why do you say that?

A. I figure that a person that gives child—or bears a child in the church, it's normal, natural. A lot of times we have had women that are pregnant that have come in there and maybe their time to deliver has been very close. They have come in there, they have sat in there. In the morning, they will get up and they will either go to their midwife or they will go to the hospital and have a baby, and they don't have no complications.

Q. How long have you been taking the sacrament?

A. I have been taking the sacrament since my mother was carrying me in her womb. I am 60 years old, so I have been with the sacrament for that [1539] long.

Q. Have your children participated in the church?

A. Yes, they have.

Q. And how old were they when they started participating?

A. When their mother was carrying them in her womb also.

Q. And when they grew older, did they voluntarily decide that they wanted to participate on their own?

A. Yes, they have. You know, when my kids, my older kids, were growing up, you know, we have had

meetings for them on their birthdays until they turn 18. And after their 18th birthday, well, you know they grew up. We figured that now they can make their own decisions. And some of them have continued to come to the church not only on their birthday, but also other occasions.

Q. Have you observed what effect participation in the Native American Church has had on your kids?

A. It's had a great impact on their life. You know, as they were growing up in the teenage years, they were like any other children of their [1540] time of any other teenager, how the teenagers are, how we were maybe when we were teenagers. But I never really forced them to come into the church. You know, I told them about it. They grew up in there. I told them about it. I told them about the bad parts of being out on the streets or drinking around or abusing drugs and alcohol. I told them about that.

What I have also told them is that, "You know, this is the choice that you have to make yourself. If you want to come into the church, fine. I am not going to force you to come in it." And a lot of times they have come to the church on their own. So it has that impact on them, you know. And they remember that and they respect that. And so every now and then, they come back in and say, "Well, we are going to come to church. Set up for tonight, Dad."

Q. And were you able to observe what impact it had on their character or what you believe, as their father, the impact that it had on their character?

A. I think it had a good impact on them because they have respect for the elders, they have respect for all their relatives, they have respect [1541] for our

native ways, our native cultures and traditions. And I think that through this church, that they have gained that respect of other people.

Q. So when they were teenagers, they participated in the church whenever they wanted to?

A. Right, whenever they wanted to.

Q. Would you have allowed them to take alcohol at that age?

A. I don't know. I didn't allow them, but you know, it's just like any other teenagers, you know, they can find somebody to buy it for them.

Q. In your experience, have you found that any members of the Native American Church have sold peyote to someone outside the church for some sort of recreational use?

A. No.

Q. And why wouldn't that happen?

MR. SZUBIN: Objection, Your Honor. It calls for speculation.

THE COURT: Well, he can answer on his own behalf.

Q. (By Mr. Boyd) Why wouldn't you do it?

A. I wouldn't do it because I have respect for what we call our sacrament. This peyote is our sacrament. It's our grandfather, our grandfather, [1542] our friend, however that we look at it and treat it. You know, we put that herb here and say that this has had an impact on my life by keeping me alive, keeping me from harm and danger, keeping me sober, keeping me from doing a lot of other things that I might have been doing today,

you know, if I was not practicing Native American Church ceremonies.

Q. Are you familiar—you know Mr. Harrington in the back of the room, do you not?

A. Yes.

Q. And are you familiar with his Native American Church organization?

A. Yes.

Q. And you have conducted ceremonies for them?

A. Yes, I have.

Q. And have you had an opportunity, as an experienced roadman, to observe their sincerity in the conduct of those ceremonies?

A. Yes, I have.

Q. And would you tell me what you think about that?

A. Their organization has been in existence for over 30 years. I know when they got their organization started. I know some of the elders [1543] that helped them get their organization started. There are some of them that have left the church or gone out on their own somewhere else, but there are others that have stayed with the church for the last 30-some-odd years. And there are others that have come into the organization and have stayed with their organization up to this date. And in my mind, I feel that they are very sincere in what they are doing.

Q. Do they appear to you to understand the religion?

A. Yes.

Q. Do they understand the ceremonies?

A. They understand the ceremonies.

Q. And do they conduct the ceremonies in the way that you conduct the ceremonies or roughly the same way?

A. Well, basically in the basic form, yes, they have.

Q. What would be the effect on your church organization if the government maue a decision to impose a 25 percent Indian blood requirement on your church and enforced it?

A. It would have a great impact on my organization or our chapter. Not only would it bar [1544] my nephews, my nieces, my grandkids, my wife, and other members of our chapter up there, it would have a great impact. And by excluding them, then it would also have an impact on us because this is our religion, and this is the religion that they choose to follow. This is their spirituality that they have chosen to follow. This is a spirituality that, without them being there, it's like cutting off an arm that my family is not welcome into my church, or my family is prohibited from coming into my church and my family is prohibited from coming into their church that they believe in.

Their faith would be shattered. Their love for the human people would be shattered. Their hopes would be shattered. It would—it would also probably destroy families, break up families. You know, it would-have that impact on them.

Q. Is your group the only group that is like that, or are there a number of other Native American Church organizations around the country that, from your observations, have the same situation?

A. From my observation, there are other churches or other groups that have non-natives in their organization.

Q. And there are other groups that have [1545] non-native family members?

A. Yes.

Q. And you have not only non-native family members, but you have close friends in your group, too?

A. Yes, I do.

Q. At the same time, there are some organizations, aren't there, that just make the decision that they are going to exclude anyone who is not a Native American; is that right?

A. Yes, there are organizations that do that, yes.

Q. Okay. I think you have testified earlier that it's your estimate that there is about 60/40, 40 percent that would exclude anyone who is non-native, and 60 percent who are open?

A. Yes.

MR. SZUBIN: Your Honor, I think he is mischaracterizing Mr. Naranjo's testimony. He was testifying about meetings that he personally attended.

Q. (By Mr. Boyd) Well, of the meetings that you have attended—

A. Yes—

Q. —is that a fair?

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CV-00-1647 JP/RLP

O CENTRO ESPIRITA BENEFICIENTE
UNIAO DO VEGETAL, ET AL., PLAINTIFFS

vs.

JOHN ASHCROFT, ET AL., DEFENDANTS

TRANSCRIPT OF PROCEEDINGS

Motion Hearing
Nov. 1, 2001

BEFORE: THE HONORABLE JAMES A. PARKER
United States District Judge

APPEARANCES

FOR THE PLAINTIFF:

NANCY HOLLANDER
JOHN W. BOYD
FREEDMAN, BOYD, DANIELS,
HOLLANDER, GOLDBERG & CLINE
20 First Plaza, Suite 700
Albuquerque, New Mexico 87102

FOR THE DEFENDANT:

ELIZABETH GOITEIN
VINCENT M. GARVEY
UNITED STATES DEPARTMENT
OF JUSTICE
901 E. Street, N.W.
Room 1032
Washington, D.C. 20004

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[1619] been requesting them for the past two months through Mr. Boyd.

THE COURT: Okay. Go ahead, Mr. Boyd.

Q. (By Mr. Boyd) Mr. Naranjo, would you explain to the Court what the role of the peyote itself is in the rituals of the Native American Church?

A. Our belief in this herb is that this herb gives us compassion for our fellow man. It gives us a closeness to the Creator. It also helps us in our lives. It also gives us a feeling that it only can be explained if you have been there once or twice or more than that.

Peyote is a bitter-tasting herb no matter how you try to take it. You know, whether it's taken fresh or in the dried form or in a tea form, it's still bitter. But we feel that through this we can obtain and feel the closeness with the Creator by not hallucinating, or—it's just a feeling that you may have.

It's faith that we have. Faith in the Creator, faith in the herb that has been set aside or that has been shown to us or by being given to us by a grandmother that needed help. It's a long story about what peyote—and how it came to the [1620] Native Americans.

It goes back hundreds, thousands of years, you know, the story itself. It has many different variations of the story, because different ones understand it or heard it differently or however you may perceive this story to be.

Basically, it's a herb that was founded by a grandmother, who we call a Grandmother, and she was that person that had been told by a spirit—this herb had been there, close to her—that it would revive her

and would take away the thirst, the hunger that she had, and it would make her stronger, and that she could return back to her people.

Q. What is its—can you characterize how or in what way it allows you to communicate with the Creator?

A. It—by taking this herb, we feel that it gives us a chance, it gives our body a chance, and it gives our mind, our spirit, a chance to have a closer relationship with a Creator, or the Creator. The faith that we have.

Q. Well, do the non-Indian members of your congregation or your Native American Church group share these beliefs with you, as far as you know?

A. As far as I know.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CV-00-1647 JP/RLP

O CENTRO ESPIRITA BENEFICIENTE
UNIAO DO VEGETAL, ET AL., PLAINTIFFS

vs.

JOHN ASHCROFT, ET AL., DEFENDANTS

TRANSCRIPT OF PROCEEDINGS

Motion Hearing
Nov. 2, 2001

BEFORE: THE HONORABLE JAMES A. PARKER
United States District Judge

APPEARANCES

FOR THE PLAINTIFF:

NANCY HOLLANDER
JOHN W. BOYD
FREEDMAN, BOYD, DANIELS,
HOLLANDER, GOLDBERG & CLINE
20 First Plaza, Suite 700
Albuquerque, New Mexico 87102

FOR THE DEFENDANT:

ELIZABETH GOITEIN
VINCENT M. GARVEY
UNITED STATES DEPARTMENT
OF JUSTICE
901 E. Street, N.W.
Room 1032
Washington, D.C. 20004

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[1914]

CROSS-EXAMINATION

BY MR. BOYD:

Q. You know from your parents, don't you, that the Native American Church came to Navajoland from Oklahoma via the Utes of Southern Colorado; isn't that true?

A. Yes.

Q. And it came sometime in the 1920s or '30s to the Navajo reservation?

A. I assume so. That is what people have written, yes.

Q. And shortly after it got there, it was actually—there was a resolution passed by the Navajo Tribal Council actually banning it from the reservation; isn't that true?

A. I have no idea.

Q. You never heard that?

A. I maybe heard it in passing, but I am not familiar, that familiar with it. I have not seen the resolution.

Q. But you know from your parents, don't you, that there was one period of time when the Native American Church was actually forbidden on the Navajo Reservation because it wasn't a traditional religion of the Navajos?

[1915]

A. As well as a lot of other traditional Native American ceremonies, yes, sir.

Q. But it was banned for some period of time because it was not a traditional religion?

A. Yes. I believe so.

Q. Okay. Now, when NACNA amended its bylaws —I want you to turn for a moment to Exhibit F again. Those are your packet of bylaws.

A. Uh-huh.

Q. And if you would turn to the revised 6/19/1999 one—I think it's the either the second or the third document.

A. The second document, I think.

Q. Yes. And Article 3?

A. Yes, sir.

Q. Now, there is a notation in the margin of mine that says—I can't see what the first word is. Is it May or something, or May, June, 1995 or—

A. I am unable to decipher that. I know the second part says June 1995.

Q. Well, isn't it correct that this article was actually changed, amendments were made, or at least some amendments to this article were made in June of 1995, and that there were some other * * *.

* * * * *

[1946] American Church?

A. Yes.

Q. How long have you been a member of the church?

A. My mom and my father told me that I was born into it. They were already members way back when I

was born. I guess I took it whenever—since I was an infant.

Q. Have you ever held any positions in the Native American Church, any leadership positions?

A. Yes.

Q. What is that?

A. I am a former Native American Church of Navajoland president.

Q. What is the Native American Church of Navajoland?

A. It's an organization that is formed by all Navajo and Navajo Reservation.

Q. Is the Native American Church of Navajoland a chapter?

A. Native American Church of Navajoland is structured to where it has executive officer, meaning they have a president, a vice-president and secretary and treasurer. Along with it, it has a board member that makes the decision along with * * *.

* * * * *

[2016] don't we take about a ten-minute recess at this time. Okay. We will be in recess. (A brief recess was taken).

THE COURT: Okay. Court is in session.

Be seated, please.

CROSS-EXAMINATION

BY MR. BOYD:

Q. Dr. Deloria, you heard Mr. Dayish's testimony and Mr. Whitehorse's testimony here today, didn't you? Or at least some of it?

A. I heard some of it.

Q. Is it fair to say that there is a certain level of fear on the part of Indian people regarding the government's involvement with them, and particularly their religious life?

A. Oh, certainly, yeah.

Q. And why is that?

A. From a long history of intrusions into various ceremonies, celebrations, beliefs.

Q. With respect to the Native American Church's use of peyote as a sacrament, that is actually part of a tradition that has characterized many, many, many religions over the course of human history; isn't that true?

A. Yes. I would say that.

[2017]

Q. Whether it's tea or plants or cactus buttons; is that right?

A. Right. Or sprinkling or full immersion, or—you name it.

Q. Okay. And those are basically the ways that people—that many people over the course of human history have found as a way to connect to their gods, to the divine; is that true?

A. Some higher spiritual force or entity.

Q. In fact, on our continent, isn't there a basis to believe that the vision of the Virgin of Guadalupe in some way relates to a native ingestion of some substance in connection with a religion?

A. I think there are a number of traditions coming out of there, and that is certainly one of them, as far as I understand. And when they were repairing the temple that was built originally over the site, when they came to the altar they found very ancient religious artifacts there, including I guess, a statuette of the Corn Mother.

And so you would assume that they had had some beverage that went along with those celebrations. And the question would then be whether, in worshipping the Virgin of Guadalupe, whether you are worshipping the Indian femininity or [2018] the Virgin Mary. So it's a toss-up for scholars.

Q. You believe, do you not, that religions in this country are in some way together, moving towards some sort of unified concept of a Creator, don't you?

A. Yes, I think you can see lines of thought and practice moving in that direction.

Q. And it's also your belief, isn't it, that that movement towards worshipping a Creator has to do in great degree with the presence of the Native American people in this country and their approach to the issue of what is the divine?

A. I think our major factors—interest and environment certainly is a factor. Fatigue with the old Christian formula is certainly a factor. And the world being in our living room every afternoon for the news is certainly a factor, and then can you see that merging come from—well, it's been going on for a generation,

and it's reaching proportions where it's reasonably easy for scholars to begin to look at it seriously.

Q. And you don't think that is a bad thing? You think that is a good thing, don't you?

A. Well, it doesn't matter. I think it's an inevitable thing.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ. No. 00-1647 JP/RLP

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL (A.K.A. UNIAO DO VEGETAL) (USA) ("UVD-USA"), A NEW MEXICO CORPORATION ON ITS OWN BEHALF AND ON BEHALF OF ALL ITS MEMBERS IN THE UNITED STATES, JEFFREY BRONFMAN, INDIVIDUALLY AND AS PRESIDENT OF UDV-USA, CHRISTINA BARRETO, INDIVIDUALLY AND AS SECRETARY OF UDV-USA, FERNANDO BARRETO, INDIVIDUALLY AND AS TREASURER OF UDV-USA, CHRISTINE BERMAN, MITCHEL BERMAN, JUSSARA DE ALMEIDA DIAS, PATRICIA DOMINGO, DAVID LENDERTS, DAVID MARTIN, MARIA EUGENIA PELAEZ, BRYAN REA, DON ST. JOHN, CARMEN TUCKER, AND SOLAR LAW, INDIVIDUALLY AND AS MEMBERS OF UDV-USA, PLAINTIFFS

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, DONNIE R. MARSHALL, ADMINISTRATOR OF THE UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, PAUL H. O'NEILL, SECRETARY OF THE DEPARTMENT OF TREASURY OF THE UNITED STATES, DAVID IGLESIAS, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW MEXICO, AND JOHN O'TOOLE, RESIDENT SPECIAL AGENT IN CHARGE OF THE UNITED STATES CUSTOMS SERVICE OFFICE OF CRIMINAL INVESTIGATION IN ALBUQUERQUE, NEW MEXICO, ALL IN THEIR OFFICIAL CAPACITIES, DEFENDANTS

[Filed: Feb. 25, 2002]

MEMORANDUM OPINION AND ORDER

The Plaintiffs seek a preliminary injunction on a number of grounds, including Equal Protection under the Fifth Amendment to the United States Constitution. On January 7, 2002, the Native American Church of Oklahoma, the Native American Church of North America, and the Native American Church of the Kiowa Tribe of the State of Oklahoma filed a Motion to File an *Amicus Curiae* Brief in Opposition to Plaintiffs' Application for a Preliminary Injunction (Doc. No. 82). These Native American Church organizations request leave to participate in the briefing of this case with respect to the Plaintiffs' Equal Protection claim.

After carefully considering the parties' briefs, the arguments and evidence presented by the Plaintiffs and Defendants during the evidentiary hearing that took place from October 22, 2001 to November 2, 2001, and the relevant law, this Court has concluded 1) that the Motion to File an *Amicus Curiae* brief should be denied; and 2) that the Plaintiffs' Motion for Preliminary Injunction (Doc. No. 10) should be denied as to their Equal Protection claim.

I. BACKGROUND

The Plaintiffs in this case are a church, O Centro Espirita Beneficiente Uniao do Vegetal (UDV), and several officials and members of the UDV in the United States. José Gabriel Da Costa, known as Mestre Gabriel within the UDV, founded the church in Brazil in 1961. Although the UDV is a Christian denomination, the church draws on traditional indigenous beliefs and practices in Brazil. Religious ceremonies in the UDV largely center around the consumption of hoasca, a tea brewed from two plants native to the Amazon River

Basin. Adherents to the UDV consider hoasca a sacrament. The UDV officially established a branch in the United States in 1993. Plaintiff Jeffrey Bronfman, as representative mestre and president of the UDV in the United States, leads the church within this country. The U.S. branch of the UDV now numbers about 130 members, and its headquarters are in Santa Fe, New Mexico.

This case arises from the United States Customs Service's seizure in the United States, on May 21, 1999, of a substantial quantity of hoasca tea from the UDV. The United States government has maintained that possession and use of hoasca is illegal under the Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq.* Hoasca contains dimethyltryptamine (DMT), a hallucinogenic chemical. The CSA classifies DMT as a "Schedule I" substance and generally bars its use and possession. The government has not filed criminal charges against any UDV members for possessing DMT, but it has threatened prosecution for future possession of hoasca. In response to the government's position, the UDV has suspended its use of hoasca use in the United States. The government concedes, at this stage of litigation, that prohibitions on hoasca use in the United States substantially burden the Plaintiffs' exercise of their religion.

On November 21, 2000, the Plaintiffs filed a Complaint for Declaratory and Injunctive Relief (Doc. No. 1). The Complaint alleges violations of the Religious Freedom Restoration Act, the First Amendment to the United States Constitution, Equal Protection principles, the Fourth Amendment, the Fifth Amendment, the Administrative Procedure Act, and international laws and treaties. The Complaint also asserts that the

Controlled Substances Act should not be construed to apply to hoasca. On December 22, 2000, the Plaintiffs filed a Motion for Preliminary Injunction (Doc. No. 10). On October 22 through November 2, 2001, this Court held a hearing on the Plaintiffs' Motion for Preliminary Injunction. During this hearing, the parties presented arguments and evidence on a number of the issues raised by the Plaintiffs' motion.

II. *AMICI CURIAE*

This Memorandum Opinion and Order, the first opinion entered concerning the Plaintiffs' Motion for Preliminary Injunction, primarily addresses the Plaintiffs' Equal Protection claim. The Court's decision to begin with this issue stems in part from the efforts of a group of Native American Church organizations to enter this case as *amici curiae*. On January 7, 2002, the Native American Church of Oklahoma, the Native American Church of North America, and the Native American Church of the Kiowa Tribe of the State of Oklahoma submitted a Motion to File an Amicus Curiae Brief in Opposition to Plaintiffs' Application for a Preliminary Injunction (Doc. No. 82). These NAC organizations contend that their participation as *amici* "would assist the Court in making its decision regarding Plaintiffs' Motion for Preliminary Injunction with respect to Plaintiffs' constitutional Equal Protection claim." (See NAC Motion at 1). The Plaintiffs maintain that the federal government violates Equal Protection principles by granting members of the Native American Church an exemption from prosecution for their ceremonial use of peyote without granting UDV members a comparable exemption for their ceremonial use of hoasca.

This Court has decided that the NAC organizations' motion to file an *amicus* brief should be denied. First, as the Plaintiffs point out in their Response in Opposition to the NAC organizations' motion (Doc. No. 84), the request to enter as *amici* is not timely. Not only have the Plaintiffs and Defendants prepared numerous briefs on the Plaintiffs' Motion for Preliminary Injunction, over a period of more than a year, the parties also presented evidence and arguments at a lengthy hearing. Allowing *amici* to step in at this late point would not be appropriate. Second, the Court does not believe that the participation of the NAC organizations in this case would be helpful to the Court. This Court has reached a decision regarding the Plaintiffs' Motion for Preliminary Injunction, as to the Equal Protection claim, without reliance on the NAC organizations' brief. That decision is set out below.

III. PLAINTIFFS' EQUAL PROTECTION CLAIM

A. STANDARD

The Tenth Circuit has stated that "[a] movant is entitled to a preliminary injunction if he can establish the following: (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest." *Kikumura* v. *Hurley*, 242 F.3d 950, 955 (10th Cir. 2001). This Memorandum Opinion and Order considers the Plaintiffs' likelihood of success on the merits of their Equal Protection claim.

This Court recognizes that "[i]f the party seeking the preliminary injunction can establish the last three fac-

tors . . . then the first factor becomes less strict—i.e., instead of showing a substantial likelihood of success, the party need only prove that there are 'questions going to the merits . . . so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'" *Prairie Band of Potawatomi Indians* v. *Pierce*, 253 F.3d 1234, 1246-1247 (10th Cir. 2001), quoting *Federal Lands Legal Consortium* v. *United States*, 195 F.3d 1190, 1194 (10th Cir. 1999). However, even assuming that the Plaintiffs have met the last three elements, it seems appropriate to examine the first element at this time. The Court has conducted an extended evidentiary hearing on the Equal Protection issue, and the parties have indicated that they would present little additional evidence about the issue if a trial on the merits is held. (Tr. at 2034-2035.) In other words, "deliberate investigation" has already taken place.

B. DISCUSSION

The Fourteenth Amendment declares that no state may "deny to any person within its jurisdiction the equal protection of the laws." Equal Protection standards apply to federal laws through the Fifth Amendment's due process guarantee. See, e.g., *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975). The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 439 (1985), citing *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982). The United States Supreme Court has explained that "equal protection analysis requires strict scrutiny of a legislative classification . . . when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of

a suspect class." *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 312 (1976).

In this case, the Plaintiffs contend that the federal government is violating Equal Protection principles by selectively enforcing the Controlled Substances Act (CSA), 21 U.S.C. § 812. The Plaintiffs' argument relies on a comparison between the government's treatment of the UDV and its treatment of the Native American Church (NAC). The Plaintiffs point out that in both the UDV and the NAC, ingestion of a controlled substance is crucial to the practice of the religion. However, under federal law, members of the NAC receive an exemption from prosecution for their ceremonial use of peyote. UDV members receive no such exemption for their ceremonial use of hoasca. The Plaintiffs maintain that the contrast in federal policies toward the NAC and the UDV represents an impermissible classification on the basis of religion.

In discussing the federal peyote exemption, the Plaintiffs focus on the regulatory provision addressing peyote use in the NAC. The Drug Enforcement Administration (DEA), promulgates regulations to implement the CSA. The CSA, enacted in 1970, lists peyote as a "Schedule I" drug. 21 U.S.C. § 812(c). Under the framework of the CSA, the placement of peyote in Schedule I reflects findings that peyote "has a high potential for abuse," that peyote "has no currently accepted medical use in treatment in the United States," and that "[t]here is a lack of accepted safety for use of [peyote] under medical supervision." 18 U.S.C. § 812(b)(1). However, 21 C.F.R. § 1307.31, the regulatory peyote exemption, states that "[t]he listing of peyote as a controlled substance in Schedule I does not apply to

the nondrug use of peyote in bona fide religious ceremonies of the Native American Church. . . ."[1]

As the Government observes, in addition to this regulation, a federal statute also addresses ceremonial use of peyote among Native Americans. Congress enacted the American Indian Religious Freedom Act Amendments (AIRFAA) in 1994. 42 U.S.C. § 1996a. AIRFAA provides that "[n]otwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State." 42 U.S.C. § 1996a(b)(1). In AIRFAA, "the term 'Indian' means a member of an Indian tribe." 42 U.S.C. § 1996a(c)(1).

The Plaintiffs point to federal peyote policy in order to argue that because the Government does not provide comparable exemptions for the UDV's ceremonial use of hoasca, the Government is violating the Plaintiffs' right to equal protection under the law. The Government disputes this contention, maintaining that the UDV and the NAC are not similarly situated for purposes of an equal protection analysis. According to the

[1] Peyote became classified as a Schedule I controlled substance in 1966, through regulations implementing the Drug Abuse Control Amendments of 1965. When peyote was scheduled, the Food and Drug Administration adopted the first federal regulatory peyote exemption. Congress "enacted Schedule I into law" through the Controlled Substance Act of 1970. H.R. Rep. 103-675, 1994 U.S.C.C.A.N. 2404, 2405. The Bureau of Narcotics and Dangerous Drugs, the predecessor agency to the DEA, published regulations to implement the CSA in 1971, and these regulations included the exemption now contained in 21 C.F.R. § 1307.31.

Government, one "crucial difference between Plaintiffs' situation and that of Native American peyote users lies in the unique relationship between the federal government and Indian tribes." (Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction (Doc. No. 15), at 42.)

In support of its position, the Government cites *Morton v. Mancari*, 417 U.S. 535 (1974). In *Morton*, a group of non-Indian employees of the Bureau of Indian Affairs (BIA) raised a Fifth-Amendment challenge to the agency's hiring preference for Indian employees. The United States Supreme Court rejected the *Morton* plaintiffs' claim that the preference amounted to "invidious racial discrimination." *Id.* at 551. In explaining its decision, the Court took note of "the unique legal status of Indian tribes under federal law" and of "the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." *Id.*

The Court listed numerous examples of instances in which it "specifically has upheld legislation that singles out Indians for particular and special treatment," and it stated that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 554-55. The *Morton* Court emphasized that it was not sanctioning a "racial" preference through its holding. Because the BIA hiring "preference is not directed towards a 'racial' group consisting of 'Indians,' but rather "only to members of 'federally recognized' tribes," the Court characterized the preference as "political rather than racial in nature." *Id.* at 553, n. 24.

The Government argues that the federal peyote exemption does not violate Equal Protection guarantees, because any special treatment that the exemption extends toward members of the Native American Church stems from the federal government's responsibility to protect Indian cultures and traditions. There seems to be little question that Congress drew on the trust responsibility described in *Morton* when it enacted AIRFAA. Stating its findings in the statute, Congress observed that "for many Indian people, the traditional use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and cultures." 42 U.S.C. § 1996a(a)(1). The Congressional declarations indicate that Congress acted because "the lack of adequate and clear legal protection for the religious use of peyote by Indians may serve to stigmatize and marginalize Indian tribes and cultures, and increase the risk that they will be exposed to discriminatory treatment." 42 U.S.C. § 1996(a)(5).

The House Report prepared for AIRFAA confirms that Congress grounded its efforts to protect the ceremonial use of peyote by Indians in the reasoning of *Morton*. H.R. Report 103-675, 1994 U.S.C.C.A.N. 2404. In a section discussing the constitutionality of the proposed bill, the Report notes that "[b]ecause Indians and Indian tribes occupy a sui generis legal status in Federal law under the U.S. Constitution and enjoy a special political relationship with the United States Government, separate Indian legislation has consistently been upheld by the U.S. Supreme Court under the legal principles set forth in *Morton* v. *Mancari*, 417 U.S. 535, 551-55 (1974)." *Id.* at 2410.

The Report also quotes extensively from the Fifth Circuit's opinion in *Peyote Way Church of God* v. *Thornburgh*, 922 F.2d 1210 (5th Cir. 1991). In *Peyote Way*, the plaintiff was a church that "subscribes to many tenets similar to those of the NAC." *Id.* at 1213. Most members of the church were not of Native American descent. The church argued that the federal peyote regulation violated Equal Protection Principles by exempting only Native American Church members, and not others, from laws prohibiting peyote use. The Fifth Circuit declined to accept this argument, instead holding that:

> the federal NAC exemption allowing tribal Native Americans to continue their centuries-old tradition of peyote use is rationally related to the legitimate governmental objective of preserving Native American culture. Such preservation is fundamental to the federal government's trust relationship with tribal Native Americans. Under *Morton*, Peyote Way's members are not similarly situated to those of the NAC for purposes of cultural preservation and thus, the federal government may exempt NAC members from statutes prohibiting peyote possession without extending the exemption to Peyote Way's membership.

Id. at 1216. Based largely on the analysis provided in *Peyote Way*, the House Report expresses confidence "that the granting of a statutory religious exemption for the sacramental use of peyote solely by American Indians presents no equal protection or establishment clause problems." 1994 U.S.C.C.A.N. at 2411.

The legislative background of AIRFAA thus reflects that in enacting the statute, Congress relied on the

principles outlined in *Morton*. The Plaintiffs do not appear to dispute this, stating in their Reply brief that "AIRFA may well be based on *Morton* v. *Mancari*, 417 U.S. 535 (1974)." (Plaintiffs' Reply (Doc. No. 21) at 42-43. Rather, the Plaintiffs focus their Equal Protection challenge on the federal regulatory exemption contained in 21 C.F.R. § 1307.31. The Plaintiffs argue that the federal Government's trust relationship toward Indian tribes cannot justify the special treatment granted to NAC members through the regulation, because not all NAC members are Indians.

A number of courts addressing the constitutionality of the regulatory peyote exemption have considered questions about the ethnic composition of the Native American Church. For example, *United States* v. *Boyll*, 774 F. Supp. 1333 (D.N.M. 1991), a case arising in this District, involved a non-Indian member of a NAC congregation in Taos who was prosecuted for unlawfully importing and possessing peyote. The *Boyll* court held an evidentiary hearing and made findings of fact which included the observation that "[t]he vast majority of Native American Church congregations . . . maintains an 'open door' policy and does not exclude persons on the basis of their race." *Id.* at 1336. The *Boyll* court concluded that "[t]he plain language of the federal peyote exemption applies to all members of the Native American Church, regardless of race," and that to interpret the exemption to apply only to Indians in the NAC would produce an unlawful racial classification in violation of First Amendment and Equal Protection guarantees. *Id.* at 1338-39.

The Fifth Circuit likewise undertook an examination of the ethnic makeup of the NAC in the *Peyote Way* case, discussed above. The *Peyote Way* court stated,

"We must look to the evidence to determine whether NAC membership presupposes tribal affiliation and Native American ancestry, and thus effects a political classification under *Morton*." 922 F.2d at 1215. Unlike the *Boyll* court, however, the *Peyote Way* court found "that the record conclusively demonstrates that NAC membership is limited to Native American members of federally recognized tribes who have at least 25% Native American ancestry, and therefore represents a political classification." *Id.* at 1216.

In this case, the parties presented evidence on the issue of the ethnic composition of the Native American Church during the hearing on the Plaintiffs' Motion for Preliminary Injunction. However, this Court is reluctant to conduct the type of complex anthropological and theological inquiry that would be required to draw a definitive conclusion regarding whether non-Indians can truly be members of the NAC. The divergence in different courts' interpretations of the meaning of "the Native American Church," as used in the federal regulatory peyote exemption, reflects ambiguity in the term. The term appears to lend itself to more than one reasonable construction. On one hand, because significant organizations such as the Native American Church of North America explicitly restrict membership to people with one-quarter Indian blood, the term "Native American Church" could be read as referring to an institution composed solely of Indians. On the other hand, given that some local peyotist congregations may welcome non-Indian members, the term "Native American Church" may be interpreted more broadly.

The Supreme Court has commented that "[i]t is well established 'that an agency's construction of its own regulations is entitled to substantial deference." *Mar-*

tin v. *Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150 (1991), quoting *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986). Where "'the meaning of [regulatory] language is not free from doubt,' the reviewing court should give effect to the agency's interpretation so long as it is 'reasonable,' *Ehlert* v. *United States*, 402 U.S. 99, 105, 91 S. Ct. 1319, 1323, 28 L. Ed. 2d. 625 (1971), that is, so long as the interpretation 'sensibly conforms to the purpose and wording of the regulations.'" *Martin*, 499 U.S. at 150-151, quoting *Northern Indiana Pub. Serv. Co.* v. *Porter County Chapter of Izaak Walton League of America, Inc.*, 423 U.S. 12, 15 (1975). Here, this Court believes that the meaning of the language of 21 C.F.R. § 1307.31 is not free from doubt.

There are a number of indications that the DEA, the agency which promulgated 21 C.F.R. § 1307.31, interprets the term "Native American Church" to imply that the benefitted church members are Indian. These indications are not limited to the federal government's apparent prosecution of non-Indian members of the Native American Church for possessing peyote. See, e.g., *Boyll*, 774 F. Supp. at 1335. ("The United States adopts a racially restrictive reading of 21 C.F.R. § 1307.31, arguing that the protection contained therein applies only to members of the Native American Church who are American Indians.") For example, when the House Subcommittee on Native American Affairs held hearings on AIRFAA in 1994, the DEA provided a statement for the record. Gene R. Haislip, Deputy Assistant Administrator of the DEA's Office of Diversion Control, remarked that:

> Almost 25 years ago when Congress began hearings pertaining to the Controlled Substances Act (CSA) they decided that the traditional, historic use of peyote by members of the Native American Church (NAC) as a sacrament in traditional religious ceremonies warranted a specific exemption. Congress determined, to be consistent with past Federal practice, this exemption should be specified in regulation rather than in law. Consequently, an exception was created for the NAC to use peyote for religious purposes. *Although the NAC is not defined in the subject regulations, the members of this church are required to be Native American.*

1994 U.S.C.C.A.N. at 2415 (emphasis added).

The legislative history of AIRFAA suggests that there is greater conformity between the statutory and regulatory peyote exemptions than the Plaintiffs contend. In introducing the legislation that was passed as AIRFAA, Representative Bill Richardson stated that the proposed law would "make statutory the protection now provided by Federal regulation and the laws of 28 States for the religious use of peyote by Indian practitioners." 140 Cong. Rec. E686-03, 1994 WL 132859. At the time that Congress considered AIRFAA, the DEA also seemed to hold the view that the new law would be a statutory version of the existing regulation. In the statement submitted to the House Subcommittee on Native American Affairs, Gene Haislip expressed qualified support for the proposed legislation, noting that "[a]lthough we at DEA feel that the regulation that has been in place for almost 25 years has worked well, we would prefer a statutory exemption over an administrative exemption." 1994 U.S.C.C.A.N. at 2416. If the DEA interpreted the use of the term "Native American Church" to apply to both non-Indian and Indian church members, the enactment of the statutory exemption—

which clearly extends only to members of Indian tribes —would have marked a significant departure from the regulatory policy. Instead, the legislative background of AIRFAA indicated that the statute and regulation were contemplated to have similar reaches.[2]

In their Trial Memorandum (Doc. No. 70), the Plaintiffs question whether *Morton* remains good law, given the Supreme Court's increasing reluctance to sanction classifications based on race and ethnicity. For example, in *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995), a case addressing affirmative action, the

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[2] Because this Court reads the more recent statutory exemption for peyote and the older regulatory exemption for peyote to conform with each other, it has focused on the legislative history of the statute. However, the Court believes that the Plaintiffs' implication that the regulatory exemption had nothing to do with Indians' unique status under the law, and stemmed only from general concerns about religious freedom, is hyperbolic. Concerns about the preservation of Indian culture and concerns about religious freedom are not mutually exclusive. References to promoting Indians' religious freedom, in the history of the regulation, do not indicate, as the Plaintiffs suggest, that Indian culture was never considered by Congress or the agencies that promulgated the peyote regulation.

Prior to the enactment of the CSA, for example, a representative from the Bureau of Narcotics and Dangerous Drugs testified before Congress. Congressman Satterfield asked him about "the Native American Church involving Indians in the west who use and have for centuries used peyote in connection with religious services." Drug Abuse Control Amendments of 1970, Hearings before the Subcommittee on Public Health & Welfare of the Committee on Interstate and Foreign Commerce, House of Representatives, 91st Cong. 2d Sess. 117-18 (1970)), quoted in *Native American Church of New York* v. *United States*, 468 F. Supp. 1247, 1250 (S.D.N.Y. 1979). See also *United States* v. *Warner*, 595 F. Supp. 595, 598 (D.N.D. 1984). But see *Boyll*, 774 F. Supp. at 1339; *Native American Church of New York*, 468 F. Supp. at 1251.

Supreme Court stated that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination." 515 U.S. at 223, quoting *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986). This Court recognizes that the *Morton* doctrine has been the subject of a great deal of scholarly criticism, from a number of different ideological perspectives. See, e.g., L. Scott Gould, *Mixing Bodies and Belief: The Predicament of Tribes*, 101 Colum. L. Rev. 702 (2001). This Court also acknowledges that the strength of *Morton* may have been undercut in certain respects by recent court decisions.

For example, in *Williams* v. *Babbitt*, 115 F.3d 657 (9th Cir. 1997), the Ninth Circuit expressed doubt about whether *Morton* could justify a reading of the Reindeer Industry Act which restricted participation in the Alaskan reindeer trade to natives. The *Williams* court stated that "[w]hile *Mancari* is not necessarily limited to statutes that give special treatment to Indians on Indian land, we do read it as shielding only those statutes that affect uniquely Indian interests." *Id.* at 665. Although "[l]egislation that relates to Indian land, tribal status, self-government or culture passes *Mancari*'s rational relation test," the policy that the *Williams* court was examining did not concern these areas. *Id.* at 664, citing *United States* v. *Antelope*, 430 U.S. 641, 646 (1977). Reindeer are not indigenous to Alaska, the Court stressed, and "[t]he Act in no way relates to native land, tribal or communal status, or culture." *Id.* at 664.

However, this Court notes, first, that the Supreme Court's opinion in *Rice* v. *Cayetano*, 528 U.S. 495, 499 (2000) seems to assume the continued validity of *Mor-*

ton.[3] It refers to the *Morton* exception as "limited," but the *Rice* court lists *Morton*, as well as other cases, as establishing the proposition that "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated the their circumstances and needs." *Id.* at 519-20. The *Rice* Court's treatment of *Morton* principles suggests that *Morton* retains some vitality. This Court believes that the application of *Morton* to the special treatment at issue in this case—the federal peyote exemption—is not controversial, because the treatment is directed at tribal Indians and because the treatment concerns the preservation of Native American culture–a "uniquely Indian interest."

The Plaintiffs also challenge whether the trust relationship between the federal government and Indian tribes can support the extension of special treatment for Indians into the religious sphere. Some authorities have suggested that Indian tribes' distinct status as political bodies cannot justify special treatment for In-

[3] In *Rice*, the Supreme Court invalidated on Fifteenth Amendment grounds a provision in the Hawaiian state constitution addressing the election of the trustees to the Office of Hawaiian Affairs (OHA). The OHA was a state agency charged with administering funds for the benefit of people with aboriginal Hawaiian ancestry. The Hawaiian constitution limited the right to vote for OHA trustees to those citizens of Hawaii who were descended from the aboriginal people who inhabited the Hawaiian Islands in 1778. The Supreme Court declined to answer the question of "whether Congress may treat the native Hawaiians as it does the Indian tribes." *Rice*, 528 U.S. at 518. Instead, the Court held that, even under *Morton*, Congress could not "authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens," because such a scheme would violate the Fifteenth Amendment. *Id.* at 520-521.

dian religious practices. See, e.g., *Olsen* v. *Drug Enforcement Administration*, 878 F.2d 1458, 1469 (D.C. Cir. 1989) (Buckley, J., dissenting). This Court finds persuasive, however, the reasoning of the federal courts which have found *Morton* principles to be applicable in the area of religion. In *Rupert* v. *Director, U.S. Fish and Wildlife Service*, 957 F.2d 32, 34-35 (1992), the First Circuit offered this explanation for employing a rational basis test to evaluate the constitutionality of an exemption, under the Bald Eagle Protection Act, 16 U.S.C. § 668, for Indian tribes' religious use of eagle feathers:

> In a series of equal protection cases involving laws attacked as treating Native Americans in ways that created *racial* classifications, the Supreme Court has "repeatedly held that the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when *rationally related* to the Government's 'unique obligation toward the Indians.'" *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20, 99 S. Ct. 3055, 3068 n.20, 61 L. Ed. 2d 823 (1979) (emphasis added and citation omitted). See also *United States* v. *Antelope*, 430 U.S. 641, 645-46, 97 S. Ct. 1395, 1398, 51 L. Ed. 2d 701 (1977) (upholding federal jurisdiction over crimes committed by Native Americans on reservations); *Moe* v. *Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479-81, 96 S. Ct. 1634, 1644-45, 48 L. Ed. 2d 96 (1976) (striking down state's attempt to tax property and sales on reservation); *Morton* v. *Mancari*, 417 U.S. at 554, 94 S. Ct. at 2484-85 (upholding statute and regulation that gave preference to Native Ameri-

cans in hiring and promotions at Bureau of Indian Affairs.)

> The principles affirmed in these cases "point . . . broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications," *United States* v. *Antelope*, 430 U.S. 641, 646, 97 S. Ct. 1395, 1399, 51 L. Ed. 2d 701 (1977)), and we therefore see no reason not to use the "rational relationship" analysis here, where the government has treated Native Americans differently from others in a manner that arguably creates a *religious* classification.

See also *Peyote Way Church of God*, 922 F.2d at 1216; *United States* v. *Rush*, 738 F.2d 497, 513 (1st Cir. 1984); *McBride* v. *Shawnee County, Kansas Court Services*, 71 F. Supp. 2d 1098, 1102 (1999); *United States* v. *Warner*, 595 F. Supp. 595, 601 (D.N.D. 1984).

Courts have offered convincing rationales for finding that the federal trust responsibility encompasses the protection of the ceremonial peyote use by Indians. For example, in *United States* v. *Warner*, the District of North Dakota wrote that "it is clear from legislative history [of the American Indian Religious Freedom Act, 42 U.S.C. § 1996] that religion is an integral part of the Indian culture and use of peyote is necessary to the survival of Indian religion. [Citations omitted.] The United States is following the policy of preserving the Indians' dependent nation and culture by granting an exemption to Indians for the use of peyote in the religious ceremonies of the NAC." 595 F. Supp. at 601.

The District of Kansas, discussing a state-law peyote exemption, observed that "[s]upporting the Native American religion allows Native Americans to bond

spiritually and encourages a sense of community, which is essential to tribal self-government." *McBride* v. *Shawnee County Kansas Court Services*, 71 F. Supp. 2d at 1103. "Even if . . . the goal of tribal self-government is not advanced," the *McBride* court continued, the peyote exemption helps to accomplish another purpose of the trust doctrine—"cultural integrity." *Id.*

The Plaintiffs also present a related argument that seems to stem from the Establishment Clause of the First Amendment. They argue that given the centrality of peyote to the practices of the NAC, the federal government is imposing a race-based requirement on membership in the NAC by limiting the peyote exemption to tribal Indians. The *Boyll* court expressed this concern when it dismissed an indictment charging a non-Indian for possession of peyote. The *Boyll* court declared that "[t]o exclude individuals of a particular race from being members of a recognized religious faith is offensive to the very heart of the First Amendment," and that "there can be no more excessive entanglement of Government with religion than the Government's attempt to impose a racial restriction to membership in a religious organization." 774 F. Supp. at 1340, citing *Walz* v. *Tax Comm'n of New York*, 397 U.S. 664, 668-69 (1970).

This Court notes that *Boyll* did not include an examination of the peyote exemption in the context of *Morton*. Against the backdrop of *Morton*, this Court believes that the implementation of the federal peyote exemption can be characterized other than as the imposition of racial restrictions onto the NAC by the government. The federal government may honor a particular obligation to accommodate the traditional ceremonial use of peyote among Indian tribes, without

taking on an equivalent obligation to facilitate non-Indian's use of peyote. As the Fifth Circuit has explained:

> The unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation of church and state ordinarily required by the First Amendment. The federal government cannot at once fulfill its constitutional role as protective of tribal Native Americans and apply conventional separatist understandings of the establishment clause to that same relationship.

Peyote Way, 922 F.2d at 1217. This Court also observes that the *Boyll* opinion preceded Congress's enactment of AIRFAA in 1994. AIRFAA clarified that the peyote exemption is rooted in the trust relationship between Indian tribes and the federal government. 42 U.S.C. § 1996a.[4] This Court has been unable to locate any

[4] Plaintiffs cite *Morrison* v. *Garraghty*, 239 F.3d 648 (4th Cir. 2001) in their reply brief. *Morrison* involved an inmate at a state prison in Virginia. For safety reasons, prison officials limited inmates' possession of personal property. However, on an individual basis, an inmate could request an exemption from prison property regulations in order to possess personal property required for religious practices. The plaintiff, a non-Indian inmate, practiced "Native American Spirituality," and adhered to tenets similar to those held in tribal Indian religions. The plaintiff sued prison officials when they adopted a policy that inmates requesting items used in tribal Indian religious practices had to demonstrate Native American ancestry. The Fourth Circuit held that this policy violated the plaintiff's Equal Protection rights. The policy represented an improper racial classification which falsely assumed that "an inmate's sincerity of religious beliefs in Native American spirituality can be defined solely by his race or heritage. *Id.* at 658.

federal court opinions decided *after* the enactment of AIRFAA which have found the federal peyote exemption to extend to non-Indians.

In addition to arguing that for purposes of an Equal Protection analysis, the UDV and the NAC are not similarly situated because of the unique legal status of tribal Indians, the Government stresses that the UDV and the NAC use different substances in their religious ceremonies. In a number of cases in which religious groups have attempted to receive religious-use exemptions for marijuana, courts have compared the public health and safety risks posed by the ceremonial use of marijuana to the risks presented by the ceremonial use of peyote.

In *McBride*, members of the Rastafarian religion who had been convicted on marijuana charges in state court applied for federal habeas corpus relief on the grounds that it was unconstitutional for the state of Kansas to permit the religious use of peyote in the NAC, but not the religious use of marijuana in the Rastafarian Church. In denying the habeas petition, the court com-

This Court does not believe that *Morrison* has significant bearing on the question of whether the federal government, acting in its trust responsibility, can allow a peyote exemption which extends only to tribal Indians. The prison officials did not ground their requirement that practitioners of Indian religious demonstrate Indian heritage in the trust doctrine described in *Morton*. Nor could they have. The prison policy at issue in *Morrison* was not aimed at promoting Indian culture, but rather was part of a larger administrative scheme through which members of any religion were required to apply for exemptions for the possession of otherwise-prohibited personal property. In the present case, in contrast, Congress has explicitly invoked the trust doctrine in explaining the basis for the federal peyote exemption, and case law supports this position.

mented, first, that "[t]he two religions are not similarly situated because the circumstances surrounding their drug use is drastically different." 71 F. Supp. at 1101. While NAC members ingest peyote only at carefully-planned road meetings, the use of marijuana in the Rastafarian religion is uncontrolled. The *McBride* court also emphasized that "[p]eyote and marijuana are not abused at the same rate, and their abuse has a substantially different effect on society." *Id.* Illicit drug trafficking in peyote is minimal relative to trafficking in marijuana, the court noted.

In *Olsen* v. *Drug Enforcement Administration*, 878 F.2d 1458 (D.C. Cir. 1989), the District of Columbia Circuit reviewed the DEA's denial of a petition for an exemption allowing the Ethiopian Zion Coptic Church (EZCC) to use marijuana, a sacrament in the religion. Upholding the DEA's ruling, the Olsen court held that "the vast difference in demand for marijuana on one hand and peyote on the other warranted the DEA's response to Olsen's petition." *Id.* at 1463-64. The court further stated that although it based its "decision on the immensity of the marijuana control problem in the United States," there were other significant distinctions between the ceremonial use of peyote in the NAC and the ceremonial use of marijuana in the EZCC. *Id.* at 1464. In the NAC, peyote use takes place in a "precisely circumscribed ritual," and "use of peyote outside the ritual is sacrilegious," while the EZCC "teaches that marijuana is properly smoked 'continually all day.'" *Id.*

The First Circuit also considered a case involving members of the EZCC. *United States* v. *Rush*, 738 F.2d 497 (1st Cir. 1984). Several members of the church were convicted on marijuana charges, and one of the

bases on which they appealed their convictions was that they were "entitled as a matter of equal protection to a religious exemption from the marijuana laws on the same terms as the peyote exemption granted the Native American Church." *Id.* at 513. The First Circuit rejected this claim, pointing out that "[m]arijuana is not covered by the peyote exemption." *Id.*

As these cases suggest, differences between various drugs are relevant to the question of whether Equal Protection principles support the provision of religious-use exemptions for groups other than the NAC that use controlled substances as sacraments. The process of determining whether the UDV is similarly situated with the NAC may properly include a comparison of the controlled substances that each of the churches uses. The Plaintiffs maintain that "the NAC has some attributes that would make it a less favorable candidate for permission to use a perception-altering substance in religious ceremonies." In fact, according to the Plaintiffs, "the likelihood of diversion of peyote from NAC ceremonies to impermissible uses is greater than any likelihood that such diversion would take place with the UDV's ceremonial use of Hoasca." (Memorandum in Support of Motion for Preliminary Injunction (Doc. No. 11) at 25.)

During the hearing on the Plaintiffs' motion for preliminary injunction, the parties presented extensive evidence on the issues of the health risks associated with the ceremonial consumption of hoasca and the potential for the diversion of hoasca to non-ceremonial use. This Court will address these factual questions in more detail in its opinions on the other grounds on which the Plaintiffs base their motion for preliminary injunction. At this time, the Court will point to one

characteristic of peyote use in the NAC which distinguishes it from hoasca use in the UDV and which renders the two churches dissimilarly situated for purposes of an Equal Protection analysis. Peyote has a demonstrated track record of religious use in the United States, while hoasca does not. When Congress enacted AIRFAA in 1994, it was able to look to the track record that the NAC had established with respect to ceremonial peyote use. The "Background and Need" section of the House Report on AIRFAA stated that, since 1971,

> Native American Church use of peyote as a religious sacrament has had the limited protection of Federal regulation. Officials of the Drug Enforcement Administration of the Department of Justice testified at House hearings in 1993 and 1994 that the religious use of peyote by Indians has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country. The DEA further testified that it is unaware of the diversion of peyote to any illicit market. The NAC has a good, cooperative relationship with the DEA in insuring that peyote is lawfully harvested and distributed solely for American Indian religious use.

1994 U.S.C.C.A.N. at 2406. A regulatory peyote exemption has been in place from the inception of the Controlled Substances Act, and Congress was able to rely on reports of the real-world effects of the regulatory exemption when it enacted AIRFAA. Peyote is the only controlled substance that is the subject of a federal religious-use exemption, because no other controlled substance has established this type of history. This is not to say that the religious-use exemption scheme is frozen in time. After all, the political

branches of the government may determine that a church using a drug other than peyote has a demonstrated history of limited, appropriate use over time that would entitle it to an exemption from the Controlled Substances Act. However, the UDV is not similarly situated to the NAC such that the federal courts must step in to declare that the government violates Equal Protection principles by allowing an exemption only for the use of peyote in the NAC.

C. CONCLUSION

This Court thus concludes that the Plaintiffs' Motion for Preliminary Injunction should be denied as to their Equal Protection claim. This Court notes, however, that Plaintiffs' counsel represented at the hearing that, following discovery, the Plaintiffs may wish to pursue a claim that the government has impermissibly targeted the UDV in particular for prosecution. This Memorandum Opinion and Order does not preclude that selective prosecution claim, to the extent that such a claim would depend on an Equal Protection Analysis.

IT IS THEREFORE ORDERED THAT:

1) The Motion of the Native American Church of Oklahoma, the Native American Church of North America, and the Native American Church of the Kiowa Tribe of the State of Oklahoma to file an *Amicus Curiae* Brief in Opposition to Plaintiffs' Application for a Preliminary Injunction is denied;

2) The Plaintiffs' Motion for Preliminary Injunction is denied with respect to their Equal Protection claim.

/s/ JAMES A. PARKER
JAMES A. PARKER
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CV 00-1647 JP/RLP

O CENTRO ESPIRITA BENEFICIENTE
UNIAO DO VEGETAL, ET AL., PLAINTIFFS

vs.

JOHN ASHCROFT, ET AL., DEFENDANTS

TRANSCRIPT OF PROCEEDINGS

Motion Hearing
Sept. 3, 2002

BEFORE: THE HONORABLE JAMES A. PARKER
United States District Judge

APPEARANCES

FOR THE PLAINTIFFS:

NANCY HOLLANDER
JOHN W. BOYD
FREEDMAN, BOYD, DANIELS,
HOLLANDER, GOLDBERG & CLINE
20 First Plaza, Suite 700
Albuquerque, New Mexico 87102

FOR THE DEFENDANT:

ELIZABETH GOITEIN
ADAM J. SZUBIN
UNITED STATES DEPARTMENT
OF JUSTICE
Room 1032
Washington, D.C. 20004

* * * * *

[4]

MS. GOITEIN: Good morning, Your Honor. Elizabeth Goitein for the defendants. And with me Linden Barber and Elizabeth Willis for DEA.

THE COURT: All right. The hearing this morning was to get input from counsel on the form of a preliminary injunction that I previously ordered. I have read the proposed forms of preliminary injunction and the memoranda submitted by the parties in support, but I'm not confident that I understand the precise disputes. In a general sense it's my understanding that the defendants take the position that the plaintiffs must comply with all regulations that would apply to persons permitted to use controlled substances, and the plaintiffs take the position that some of those regulations are unduly burdensome on the practice of their religion. That's the general sense I gather. But in terms of the specific disputes I'm still adrift. So I guess there are a couple of ways we could approach this, we could walk through each regulation and I can hear each side tell me why or why not it should or should not apply, or I could ask counsel to confer further and see if we could narrow the disputes.

MS. HOLLANDER: Your Honor, if I can respond. I think your first choice would probably be the better of the two. I think that we have, in good faith, tried to reach an agreement and we have not. I think that the sides are too far adrift to do that, but we would have no objection to walking [5] through. As you've suggested, that might be the best way to make clear what the different sides are.

THE COURT: All right.

MS. GOITEIN: Your Honor, I would also just point out that while we have no objection to doing that, I'm not entirely sure what we would accomplish, because if what we ended up with are a list of regulations that the plaintiffs felt unduly burdened to the practice of their religion, it would be our position that they would have to move for an injunction against the application of those regulations in support of their motion with evidence and the legal argument and perhaps have a hearing on that issue. So I'm not sure, in terms of going through that today, what purpose that would serve necessarily.

THE COURT: Well, it would serve the purpose of helping me understand what the dispute is. I couldn't really tell from reading the briefs other than the general position.

MS. GOITEIN: All right. I understand, Your Honor.

MS. HOLLANDER: Your Honor, could I address that issue that Ms. Goitein just raised?

THE COURT: You can, it might be helpful if you did it later after I finally understand what we are arguing about. So why don't we start off with a list of—well, we'll do them one by one, the regulation that the plaintiffs feel are unduly burdensome. Start with whichever one you feel * * *.

* * * * *

[16]

MS. GOITEIN: Again, it's—I can read it again if you'd like or it's—

MS. HOLLANDER: Do you all have an extra copy?

MS. GOITEIN: I believe we might.

MS. HOLLANDER: Your Honor, may I raise a fundamental problem that we have with focusing on a specific regulation?

THE COURT: Well, I guess; I thought we had come to some agreement about its application.

MS. HOLLANDER: Well, here's the problem that I have. We do need to look at that one because I don't know what else it says. But the government is now, I think, and perhaps it's because of it's the way we started, we're focusing on these specific regulations as opposed to talking about religious conduct. The government previously has taken the position that no means short of prohibition will effectuate the government's position. That's the position the government took in its response to our preliminary injunction. Now reserving our right to argue about Ms. Goitein's view that we need an additional hearing, the government also took that position at the hearing when Your Honor specifically asked it there was a way to settle this case and she said, "There is no compromising position. One is the tea is prohibited, the other is it is somehow allowed within controls that the plaintiffs would agree to."

She also said at that hearing, and I'm on page 1440 [17] of the October 31 date, "Without an order from the court telling the government they are wrong in their interpretation of RFRA, obviously we would comply with an order of the court, but short of an order of the court or legislation, the government's position is

that their actions are dictated by the Controlled Substances Act."

Now the government is taking a slightly different position here and it's developed all of these regulations. Our problem is, although we are willing to use the regulations as a guide as a way to understand how perhaps we can reach an agreement here, we're not willing to say that the U.D.V. will comply specifically with these regulations, which is going to put us in a situation that the government said was unacceptable and that we believe will involve entanglement. And I think that, I would ask, Your Honor, when you fashion your order, to say perhaps that using these CFRs as a loose guide and using, you know, common sense and the religion as a backbone here, that we developed certain controls. That's my concern.

MS. GOITEIN: Your Honor, I have two responses to that. Our first response is, no, we don't think these regulations are sufficient to protect their compelling interests. However, certainly some regulation is better than none. And more regulation is better than less. Yes, we took the position that an outright prohibition was necessary, but [18] now that that position is no longer viable before this Court, our position following that is, first of all, that some regulation is still better than none; tight regulation is better loose. But far more important, this issue of whether plaintiffs willing to comply with regulations that on their face apply to all importers, all distributors, all dispensers of Schedule I controlled substances, makes no sense. Plaintiffs don't get to exempt themselves from valid regulations. If plaintiffs believe that these regulations are invalid, they have to raise a legal challenge to the

regulations and they have to follow the correct procedures for doing so.

THE COURT: Okay. Now that each side let off some steam let's see if we can reach an agreement. Section 1304.24, why don't you restate what the government would accept as a compliance with Section 1304.24?

MS. GOITEIN: Your Honor, we would accept compliance with all of the provisions of 1304.24 except the provisions that are enacted on their face, such as records of identity of diagnosis and prognosis of the people receiving the substance. And we will agree to waive Section (A)5, which requires adequate identification of consumer. Oh, also Section (A)6, amount consumed. We would agree to have that in a general, rather than individual numbers of the amounts consumed at the ceremony. And for Number 5, instead of * * *.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV. No. 00-1647 JP/RLP

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL (A.K.A. UNIAO DO VEGETAL) (USA) ("UDV-USA"), A NEW MEXICO CORPORATION ON ITS OWN BEHALF AND ON BEHALF OF ALL ITS MEMBERS IN THE UNITED STATES, JEFFREY BRONFMAN, INDIVIDUALLY AND AS PRESIDENT OF UDV-USA, CHRISTINA BARRETO, INDIVIDUALLY AND AS SECRETARY OF UDV-USA, FERNANDO BARRETO, INDIVIDUALLY AND AS TREASURER OF UDV-USA, CHRISTINE BERMAN, MITCHEL BERMAN, JUSSARA DE ALEMEIDA DIAS, PATRICIA DOMINGO, DAVID LENDERTS, DAVID MARTIN, MARIA EUGENIA PELAEZ, BRYAN REA, DON ST. JOHN, CARMEN TUCKER, AND SOLAR LAW, INDIVIDUALLY AND AS MEMBERS OF UDV-USA,
PLAINTIFFS

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, DONNIE R. MARSHALL, ADMINISTRATOR OF THE UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, PAUL H. O'NEILL, SECRETARY OF THE DEPARTMENT OF TREASURY OF THE UNITED STATES, DAVID IGLESIAS, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW MEXICO, AND JOHN O'TOOLE, RESIDENT SPECIAL AGENT IN CHARGE OF THE UNITED STATES CUSTOMS SERVICE OFFICE OF CRIMINAL INVESTIGATION IN ALBUQUERQUE, NEW MEXICO, ALL IN THEIR OFFICIAL CAPACITIES,
DEFENDANTS

MEMORANDUM OPINION AND ORDER

On November 25, 2002, the Defendants filed a Motion and Supporting Memorandum to Stay Preliminary Injunction Pending Appeal (Doc. No. 107). A hearing was held on the motion to stay on December 2, 2002. Plaintiffs' counsel John Boyd and Nancy Hollander, Plaintiff Jeffrey Bronfman, and Defendants' counsel Elizabeth Goitein participated in the hearing. Having considered the briefs, arguments of counsel, and the relevant law, the Court finds that the motion to stay should be denied.

A. Discussion

To obtain a stay of an injunction pending appeal, the applicant must address the following factors: "(1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The Tenth Circuit has elaborated on these factors by stating that: "If [applicants] can meet the other requirements for a stay pending appeal, they will be deemed to have satisfied the likelihood of success on appeal element if they show 'questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation.'" *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996) (citations omitted).

1. Likelihood of Success on the Merits

The Defendants make three arguments to demonstrate a strong likelihood of success on appeal. First, the defendants argue that the Court of Appeals will agree with the Defendants' interpretation of the 1971 Convention on Psychotropic Substances (Convention). Second, the Defendants argue that the Court of Appeals will find a compelling interest in protecting the health and safety of UDV members. Third, the Defendants argue that the Court of Appeals will find a compelling interest in preventing diversion of hoasca.

a. The 1971 Convention on Psychotropic Substances

The Defendants argue that the Convention applies to hoasca under the definition of a "preparation" (a solution or mixture) containing a Schedule I substance. The Defendants also argue that the Court failed to accord due deference to the interpretation of the Convention by the State Department which states that "the Convention on Psychotropic Substances imposes an obligation on the United States to prohibit the use, manufacture, import or export of any controlled substances on Schedule I, such as DMT, and any preparation containing such a controlled substance, such as the ayahuasca tea transported for Brazil." The Plaintiffs note, however, that the Secretary of the United Nations International Narcotics Control Board, the agency which enforces the Convention, wrote an apparently unofficial letter dated January 17, 2001, which stated that: "No plants (natural materials) containing DMT are a [*sic*] present controlled under the 1971 Convention on Psychotropic Substances. Consequently, preparations (e.g. decoctions) made of these plants, including

ayahuasca are not under international control and, therefore, not subject to any of the articles of the of the 1971 Convention."

The Court is not obliged to accept an agency interpretation which is unreasonable. *El Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."). In light of the Court's Memorandum Opinion and Order (Doc. No. 88). Filed August 12, 2002), which fully supports the finding that the Convention does not apply to hoasca, the Court finds that it is not required to give due deference to the State Department's interpretation of the Convention. Moreover, the Court is not required to give due deference to an agency's litigation position if that position is not a long-standing agency view. *BMW of North America v. U.S.*, 39 F. Supp.2d 445, 449 (D.N.J. 1998) (quoting *Appalachian States Low-Level Radioactive Waste Comm'n v. Pena*, 126 F.3d 193, 198 (3d Cir. 1997)). There is no indication in this case that the State Department's interpretation is anything but an agency's litigation position. In addition, the January 17, 2001 letter by the Secretary of the United Nations International Narcotics Control Board, although not previously before this Court and not binding on this Court, provides a further indication that the Convention does not apply to hoasca. The Court concludes that the Defendants have not made a strong showing that they would likely be successful on appeal with respect to the issue of whether the Convention applies to hoasca.

b. Compelling Interest in Protecting the Health and Safety of UDV Members

The Defendants argue that the Court should have deferred to Congress's factual finding that DMT is unsafe, and then considered whether the government had a compelling interest in prohibiting the Plaintiffs, in particular, from using DMT. The Defendants argue that the government has a compelling interest in prohibiting the Plaintiffs from using DMT. The Defendants further argue that since the Court found that the evidence was in "equipose" with respect to the hoasca's health risks, this case is one in which there are "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issue ripe for litigation and deserving of more deliberate investigation." *See McClendon*, 79 F.3d at 1020 (10th Cir. 1996). Alternatively, the Defendants argue that the evidence clearly showed the health risks associated with drinking hoasca. The Plaintiffs argue persuasively, on the other hand, that this Court has already carefully considered the evidence on this point and concluded that the Defendants failed to carry their burden under the Religious Freedom Restoration Act (RFRA). Considering the Court's thorough review of the health related evidence presented by the parties' experts, the Court concludes that the Defendants have failed to demonstrate a strong showing that they would likely succeed on appeal on the issue of whether the United States has a compelling interest in the health and safety of the UDV members.

c. Compelling Interest in Preventing Diversion of Hoasca

The Defendants argue that the evidence shows that hoasca would likely be diverted. The Defendants argue

alternatively that the Court's finding that the evidence was "virtually balanced" is sufficient reason to grant the stay because the case presented "serious" and "difficult" questions "deserving of more deliberate investigation." Again, the Plaintiff persuasively argue that the Court as already sufficiently considered the evidence with respect to the likelihood of diversion and conclude that there is not a compelling interest in preventing diversion of hoasca. The Court concludes that the Defendants have not shown that there is a strong likelihood of success on appeal on the issue of whether the United States has a compelling interest in preventing diversion of hoasca.

d. Close Questions

The Defendants argue throughout their motion that the closeness of the evidence supports a finding under *McClendon* that there is a likelihood of success on appeal. The *McClendon* holding that close questions amount to a likelihood of success on appeal applies only if the other requirements for a stay are met. As shown below those other factors have not been met.

2. Threat of Irreparable Harm

The Defendants argue that the United States would be harmed if it was required to violate "a critical international treaty." Linda Jacobson, Assistant Legal Adviser for Law Enforcement and Intelligence at the State Department declared (attached to motion for stay) that: "If the United States were compelled to end compliance with the Convention, even if only for a temporary period pending appeal, this could seriously undermine the United States' ability to insist upon strict compliance by other treaty partners. Furthermore, such non-compliance by the United States, even

if temporary, would likely undercut ongoing diplomatic efforts to urge other countries to comply fully with this Convention." The Defendants also argue that if the preliminary injunction is allowed to go into effect the public health could be irreparably harmed and there would be a "high potential for diversion." Finally, the Defendants argue that these irreparable harms outweigh any harm the Plaintiffs would suffer by being denied use of the hoasca tea either temporarily pending appeal or permanently if the Court of Appeals rules in the Defendants' favor.

The Plaintiffs correctly argue that the Defendants have not shown that the United States will suffer from any irreparable injury if the Convention is violated. The Plaintiffs note that the Defendants are merely speculating that the United States' reputation as a leader in the war on drugs will be "tarnished." Moreover, the detailed provisions of the Preliminary Injunction adequately address the Defendants' concerns regarding the health risks of UDV members and potential diversion. The court, therefore, concludes that the Defendants have failed to show that they will suffer from irreparable injury if the Preliminary Injunction is not stayed pending appeal.

3. Public Interest

The Defendants argue that "[b]ecause RFRA does not in fact prohibit the government from enforcing the CSA against Plaintiffs, allowing Plaintiffs to use hoasca does not vindicate any of the rights that RFRA protects, and therefore does not serve the public interest." The Defendants also argue that there is a public interest in protecting the UDV member's health, preventing diversion of hoasca, and in adhering to the

international Convention. The Plaintiffs, however, successfully argue that there is a strong public interest on following RFRA. *See Jolly v. Caughlin*, 907 F. Supp. 63, 65 (S.D.N.Y. 1995), aff'd, 76 F.3d 468 (2d Cir. 1996) *overruled on other grounds, City of Boerne v. Flores*, 521 U.S. 507 (1997) (defendants failed to show that their concerns outweigh the "strong public interest in the following the law, namely RFRA and the Eighth Amendment to the Constitution."). Furthermore, the preliminary Injunction adequately addresses the Defendants' concerns regarding the health risks of theUDV members and potential diversion of hoasca. The Court concludes that the Defendants have failed to show that the public interest would be harmed if the Preliminary Injunction is not stayed pending appeal.

IT IS ORDERED that Defendants' Motion and Supporting Memorandum to Stay Preliminary Injunction Pending Appeal (Doc. No. 107) is denied.

/s/ JAMES A. PARKER
CHIEF UNITED STATES
DISTRICT JUDGE